(14)

No. 97-1287

In The

Supreme Court of the United States

October Term, 1997

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

vs.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. McMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit correctly found numerous material differences between this case and *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), including, among others, that this complaint involves: a) plan assets derived from employee contributions; b) payment from the assets of a plan to nonparticipants to whom the plan sponsor owes a separate debt; c) breach of ERISA's trust, anti-inurement, prohibited transaction, termination, and nonforfeiture provisions; and d) a sham transaction contrived to conceal departure from the law.

2. Whether the Ninth Circuit correctly found that ERISA requires that plan assets be held in trust for the exclusive benefit of plan participants, that it grants heightened protection to assets derived from employee contributions, and that these requirements can be enforced under ERISA §§ 409 and 502.

3 Whether the Ninth Circuit correctly found that ERISA's nonforfeiture provision can entitle participants in a contributory plan to amounts whose value exceeds that of defined benefits.

4. Whether the Ninth Circuit correctly found that an employer can be ordered to use the means for plan termination established by ERISA's Title IV.

PARTIES TO THE PROCEEDING

As stated in the petition for writ of certiorari,

> "Hughes Aircraft Company... recently merged with Raytheon Company. Following that merger, two corporations and two pension plans have an interest in this case: Hughes Electronics Corporation, Raytheon Company, Hughes Non-Bargaining Retirement Plan, and Raytheon Non-Bargaining Retirement Plan. All four of these entities were recently named as defendants in an amended complaint." Pet. iii.

Petitioners' Brief correctly states that Hughes Electronics Corp. and Raytheon Co. ("Raytheon") are defendants named in the amended complaint. Pet. Brf. iii. The amended complaint also names the two companies' pension plans as defendants.

In addition, the amended complaint adds five plaintiffs -- Roger Bilyeu, Beatrice A. Whyld, Dr. Bernard Winikur, Frank Henderson and Richard D. Randall -- who reside in the Central District of California to which venue was transferred, on defendants' motion, after the filing of the original complaint in the U.S. District Court for the District of Arizona. Pet. App. 4a.

Plaintiffs' motion for certification as class representatives is pending before Judge Audrey B. Collins (Judge Richard A. Gadbois Jr., the original judge in the case, having died during the pendency of plaintiffs' appeal).

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MISCELLANEOUS

INTRODUCTION

Petitioners characterize this case as "about respondents' quest for a 'pot of gold.'" Pet. Brf. 1. They fail to mention that the pot was filled by employees out of their after-tax salaries. The respondent plaintiffs are participants in Hughes' contributory pension plan which when Hughes froze participation in 1990 -- after four years in which only employees, *not* the employer, contributed (J.A. 24) -- possessed a surplus (assets that exceeded the present value of accrued benefits) of $1.2 billion. J.A. 25.[1]

The Complaint alleges that Hughes is using this surplus, much of which derives from employee contributions, to pay Hughes' separate obligations to employees who are not Contributory Plan participants. Such use of plan assets for a non-plan corporate debt breaches the Employee Retirement Income Security Act of 1974 ("ERISA"). The Complaint also alleges that by barring new participants from the Contributory Plan, Hughes capped its liabilities and insured that not all assets would be used for Contributory Plan participants, requiring Hughes to use the plan termination procedures established by ERISA.

Petitioners seek to obscure the facts of the case, especially that Hughes is diverting assets from one plan to another. They repeatedly argue that Hughes is free to use "plan assets to fund new or different benefits *for plan participants*" (emphasis supplied). Pet. Brf. 2, 10, 22. Yet the Complaint alleges that the different benefits here are *not* for Plan participants, but for other employees to whom Hughes made a separate promise. Petitioners' premise that there is just one plan raises, as the Ninth Circuit found, a factual question that cannot be decided on a motion to dismiss.

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[1] Forms 5500 filed by Hughes with the Department of Labor show the same pattern since the complaint. Employees, but not the employer, contributed to the plan, whose reported surplus was over $2 billion as of November 1996.

Their legal premise, that a defined benefit plan only owes participants the defined benefit, is also wrong. ERISA also requires that plan assets, especially those attributable to employee contributions, be held in trust and never inure to or be used for employers' benefit. An employee benefit plan under ERISA is not a profit-making insurance company whose obligation is limited to paying promised benefits, but a trust for beneficiaries of the trust. Only on the disputed factual premise that there is just one plan and by ignoring express provisions of ERISA can petitioners read *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), to support them.

STATEMENT OF THE CASE

A. The Hughes Plans

1. The Contributory Plan

From 1951 to 1979, Hughes Aircraft Co. ("Hughes") sponsored the Hughes Retirement Plan. On January 1, 1980 this plan was split into two: the Hughes Bargaining Retirement Plan for unionized employees, and the Hughes Non-Bargaining Retirement Plan (the "Contributory Plan" or "Plan"). J.A. 22, 61, 179. The Contributory Plan has at least 10,000 participants (J.A. 21) -- according to Hughes, 60,000 (J.A. 174).

Section 1.39 of the Contributory Plan as restated in 1985 defines its "participants." As defined, they include employees not covered by a union contract who agree to the Plan's provisions "to the extent consistent with applicable law," and to contribute to the Plan a portion (until 1986 4%, thereafter 3%) of their compensation, which is withheld from their pay. Exhibit 1 to March 12, 1992 Declaration of Ann L. Verhey in Support of

Defendants' Motion to Dismiss.[2] Hughes was the Contributory Plan's administrator as well as its sponsor. J.A. 21, 64, 100. The Plan called for Hughes to fund benefits "to the extent not provided by contributions of Participants." J.A. 23, 70.

From 1974, when ERISA was enacted, through 1990, employee and employer contributions to the Contributory Plan totaled $1.2 billion, of which $513 million came from the employees. J.A. 23-24. In 1986 Hughes was acquired by General Motors Corporation ("GM"), whose own retirement plan was enormously underfunded. From 1987 through 1990 there were *no* employer contributions to the Contributory Plan; employees contributed $178 million. J.A. 24-25. At the beginning of 1987, assets exceeded the present value of accrued benefits (both non-vested and vested) by $1.1 billion. J.A. 25. Even with *only* employees contributing, this figure grew thereafter, to $1.2 billion at the end of 1989. *Id.*[3]

In May 1990 Hughes announced that

> "a new retirement plan will be introduced at Hughes effective January 1, 1991. Current employees will have a choice between the existing retirement plan and the new plan. The new retirement plan will not require employee contributions and will have benefits commensurate with a non-contributory plan.

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[2] Although excerpts from this document are in the Joint Appendix (J.A. 37-104), Section 1.39 was inadvertently omitted. The Joint Appendix includes key sections referred to in 1.39, notably 2.1 (J.A. 68-9) and 3.4 (J.A. 47, 71). Since other sections referred to in 1.39 are not included, for convenience the Plan's complete Articles I (including 1.39) and II are attached as an appendix to this Brief pursuant to this Court's Rule 24.3.

[3] As previously noted, the figure later grew to over $2 billion.

> "The Company has no plan to terminate the existing retirement plan for currently participating employees." J.A. 198.

Hughes announced that while current employees could stay in the Contributory Plan, no one hired after July 1990 could join. Current employees not already in the Contributory Plan would have a "one-time opportunity" to join before December 21, 1990, after which it would admit no new participants. J.A. 208, 226.

2. The Contributory Plan and Hughes' New Retirement Plan

Effective January 1, 1991, Hughes executed a document referred to below as the "1991 Restatement." J.A. 105. Although purportedly a restatement of the Contributory Plan, the 1991 Restatement describes *both* that Plan, and the noncontributory "new retirement plan" announced by Hughes the previous spring.

The two plans, which Hughes named "benefit structures," are described in the 1991 Restatement's Exhibits A and B. Exhibits A and B state, respectively, "additional terms of the Plan that apply to Participants in the contributory benefit structure" and "in the non-contributory benefit structure." J.A. 125, 159. "Additional terms" is deceptive: as summarized below, they include virtually all provisions that make up a plan, including rules for participation, accruals, benefits, and funding. Terms not in the Exhibits, but applicable to both plans, are limited to such matters as naming Hughes as the plan administrator. J.A. 106.

The old Contributory Plan described in Exhibit A of the 1991 Restatement, and the new noncontributory plan described in Exhibit B, have totally different participants. Section 1.45 of the 1991 Restatement defines "participant" as "any person included in the Plan as provided in Article II." Article II simply refers to "the Applicable Exhibit." Exhibit 2 to March 12, 1992 Declaration of

Ann L. Verhey in Support of Defendants' Motion to Dismiss; J.A. 108. Exhibit A retains the Contributory Plan's old participation provision except that employees hired after July 1990 or who did not join by December 21, 1990 are barred. J.A. 131-2. Exhibit B, by contrast, defines as participants all non-union employees *except* participants in the Contributory Plan. J.A. 162-3. This is not a matter of one plan offering options. While participants in the Contributory Plan can switch out (though almost none have, J.A. 34), no one can join the Contributory Plan after December 1990.

Other differences between the plans are stark. The new plan has far inferior benefits. According to Hughes, only "2% of the employee participants participating in the contributory benefits structure elected to change." J.A. 34. The benefits described in Exhibits A and B (J.A. 109, 125-172) had been contrasted by Hughes itself when announcing its "new retirement plan." J.A. 198, 208-215. Major differences include:

Beneficiaries	**Contributory Plan**	**"New Retirement Plan"**
eligibility (J.A. 208, 226)	non-bargaining employees hired by August 1, 1990 who elected participation by December 21, 1990	all other non-bargaining employees
participation (*Id.*)	voluntary	automatic

Benefits		
normal pension formula (J.A. 210-211, 229)	based on years of service times .0175 times monthly average "compensation" over best-paid five years of service	based on .015 times average monthly "compensation" over 35 years of service
"compensation" on which pension is based includes all premium pay (J.A. 212)	yes	no
alternative benefit formulas used if they result in a higher pension (J.A. 210-211)	yes	no
unreduced early retirement benefit available (J.A. 213-214)	at age 55, if age and years of service total 75	at age 62, with 10 years of continuous service
COLA paid to retirees (J.A. 212)	yes	no
health benefits for retirees and dependents under age 65 (J.A. 212)	yes	no

Funding and Payment of Benefits		
employee contribution required (J.A. 210)	3% of compensation	none
certain and continuous annuity options available (J.A. 215, 230)	5, 10 or 15 years	10 years
social security adjustment option available (J.A. 215, 230-231)	yes	no
modified cash refund annuity available (J.A. 215, 230)	yes	no

In short, Exhibit A (the Contributory Plan) and Exhibit B (the "new retirement plan") are stapled to the same document and name the same administrator. They have almost nothing else in common.

Hughes' May 1990 announcement said the new retirement plan would be "paid for entirely by Hughes." J.A. 201. The 1991 Restatement, however, provides for funding of the new plan not "entirely by Hughes," but entirely from Contributory Plan assets. This plainly benefited Hughes, just as if the Contributory Plan had paid Hughes' wage, debt service or electric bills. The 1991 Restatement calls for Hughes to fund benefits "to the extent not provided by contributions of Participants if required under the Applicable Exhibit." J.A. 108. By making Contributory Plan assets available for benefits under *both* exhibits, the 1991

Restatement diverted Contributory Plan assets, largely from employee payments (Hughes had not contributed at all since 1986), to meet Hughes' obligation to the noncontributory plan.

Besides creating the "new retirement plan" announced earlier by Hughes but funding it (contrary to the announcement) out of Contributory Plan surplus, the 1991 Restatement made two significant changes in the Contributory Plan. First, it allowed Hughes to recoup surplus assets in case of plan termination, a new provision. J.A. 97-9, 118-9. Second, as already discussed, it limited participation in the Contributory Plan to employees who joined before December 21, 1990. J.A. 131-2. By closing participation in the Contributory Plan, Hughes put a ceiling on that Plan's liabilities. No new participants, only current ones, could accrue benefits. Future accruals, while significant, became actuarially predictable. Ongoing accruals also continued to require ongoing employee contributions.

Plaintiffs allege that the Contributory Plan's surplus sufficed to make it actuarially certain, once new participants were barred, that Hughes would continue to pay nothing to the Contributory Plan. Furthermore, even without employer payments, the Contributory Plan's surplus would grow forever.[4] Contributory Plan assets were "substantially in excess of those required to fund all current and future pensions of participants," and no new participants could join. J.A. 26. The surplus, largely from employee payments, would finance the new noncontributory plan which Hughes had announced would be "paid for entirely by Hughes." J.A. 201.

B. The Complaint

The Complaint, filed by five plaintiffs seeking to represent "all participants of the Plan who are or may become eligible to

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[4] As noted, Forms 5500 confirm that this has been true so far.

receive retirement benefits under the Plan," alleged six causes of action under 29 U.S.C. §§ 1109 and § 1132. J.A. 19-32.[5] First, plaintiffs alleged breach of 29 U.S.C. § 1103. J.A. 27. § 1103 requires that "all assets of an employee benefit plan shall be held in trust," adding, in § 1103(c):

> "(1) Except...under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of title 26 as in effect on January 1, 1995, the assets of a plan shall never inure to the benefit of any employer."

Second, plaintiffs alleged breach of 29 U.S.C. § 1104(a)(1), which requires fiduciaries to act "solely in the interest of the participants." Third, they alleged breach of 29 U.S.C. § 1053, which makes "an employee's rights in his accrued benefit derived from his own contributions... nonforfeitable." J.A. 27-8.

Fourth, plaintiffs alleged breach of 29 U.S.C. § 1344, part of ERISA's Title IV. J.A. 28-9. Title IV sets the "exclusive means," 29 U.S.C. § 1341(a)(1), for pension plan termination. For a plan with assets sufficient to meet liabilities, these include notice from the plan administrator to affected parties including the Pension Benefit Guaranty Corporation ("PBGC"), and can conclude with the employer's receipt of surplus assets only pursuant to § 1344(d). That section allows employers to recoup surplus derived from their own payments if a plan provision permitting recoupment has been in effect for at least five years. Surplus attributable to employee payments must "be equitably

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[5] § 1109(a) makes plan fiduciaries which breach a duty to a plan "liable to make good... any losses to the plan... , and to restore to such plan any profits... made through use of assets of the plan." It permits "other equitable or remedial relief." § 1132(a) lets plan participants sue to enjoin violations of ERISA or for "other appropriate equitable relief" to enforce the statute.

distributed to the participants who made such contributions," under § 1344(d)(3). The statute, that is, requires that employee contributors to a pension trust be given the remainder as well as the beneficial interest in this part of its assets. § 1103, already quoted, makes employer recoupment of assets an express exception to its anti-inurement rule. The Internal Revenue Code's ("Code's") § 4980 requires employers to pay a special tax on recouped assets.

Plaintiffs alleged that by closing participation in the Contributory Plan and thereby creating an actuarial certainty that a large share of its assets would never be used to pay benefits to Contributory Plan participants, Hughes rendered the Contributory Plan what at common law can be called a "wasting," "dry" or "resulting" trust. These terms mean, basically, that if a trust's assets will not be used for their intended purpose, the trust should be terminated and its assets equitably distributed. For a pension trust, Title IV specifies the means of termination including how assets are allotted. Having rendered the Plan a wasting trust, plaintiffs argued, Hughes must use the prescribed means for plan termination and ultimately distribute surplus under § 1344 -- instead of using assets of the wasting trust to meet Hughes' separate obligations under the new noncontributory plan.

Fifth, plaintiffs alleged a breach of 29 U.S.C.§ 1106(a)(1), which forbids a fiduciary to cause a plan to engage in a transaction which the fiduciary "knows or should know... constitutes a direct or indirect ... use by or for the benefit of a party in interest of any assets of the plan." J.A. 29-30. They alleged that by using Contributory Plan assets to pay its separate debt to the noncontributory plan, Hughes breached §§ 1104 and 1106.

The sixth and last cause of action involved facts different from the others. In 1989, Hughes created an early-retirement program which used Contributory Plan assets to induce some employees to retire. J.A. 25-6, 42-5. Plaintiffs alleged that in

using Plan assets for this purpose, rather than for the participants, Hughes breached § 1104. J.A. 30-1.

C. District Court Proceedings

Before any discovery, Judge. Gadbois dismissed the complaint without leave to amend. Pet. App. 4a, 53a-63a. He held that in a defined benefit plan "No participant has a right to the surplus assets, but instead is entitled to the defined benefit" (Pet. App. 56a); that "upon the face of Plan documents" the contributory and noncontributory "benefits structures" are not two distinct plans (Pet. App. 58a); and that "As the allegations are insufficient to establish that a new plan has been created, Plan assets cannot have been unlawfully diverted" (Pet. App. 60a). He called "wasting trust analysis... not applicable." Pet. App. 59a.

D. Ninth Circuit Proceedings

The Ninth Circuit reversed. Pet. App. 1a-27a. It summarized the claim that Hughes was diverting Contributory Plan surplus to the new noncontributory plan, and said that to accept Hughes' denial at the pleading stage would "disregard plaintiffs' allegations... that two separate pension plans exist." Pet. App. 3a-4a, 16a. Besides the question if there was one plan or two, the court saw another issue requiring factual development: whether closing enrollment in the Contributory Plan made it a wasting trust which must be terminated. To decide that, the court said, required evidence of whether the "Contributory Plan's purposes have been accomplished and whether its liabilities are fixed enough to terminate the plan." Pet. App. 11a and n. 3, 22a-23a.

The panel noted numerous differences from *Lockheed*, including that there: a) the plan was solely employer-funded, b) an amendment enhanced benefits for plan participants, and c) no one claimed Lockheed had made its plan a wasting trust or devised a sham transaction to cloak the unlawful transfer of assets to another

plan. Pet. 7a-8a, 25a. Judge Norris, dissenting, called the "contributory/non-contributory dichotomy... the heart of the majority's analysis," and said that "[i]n terms of economic reality" the distinction "should make no difference." Pet. App. 37a. Like Judge Gadbois, he argued that participants in a defined benefit plan are entitled to *only* defined benefits and that "The 1991 amendment did not create a separate pension plan." Pet. App. 48a, 30a-31a. He also endorsed a suggestion that since "[i]n bad times (when declines in the value of assets make plans underfunded) employers must contribute more," it would be "asymmetric" not to let them profit from plan surpluses. Pet. App. 29a-30a, quoting *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (7th Cir. 1994)..

SUMMARY OF ARGUMENT

1. In substance, what Hughes did in this case was to create a new, separate plan for non-participants in the Contributory Plan, then dip into the Contributory Plan's coffers to meet this unrelated debt. To insure the availability of the entire Contributory Plan surplus, Hughes capped that Plan's liabilities by barring new participants, which insured that not all Contributory Plan assets would be used for Contributory Plan participants. Having done this, Hughes should have used Title IV means to terminate the Contributory Plan, but did not do so because it did not want to distribute surplus to employees nor to pay tax. By *not* using Title IV means to terminate the Contributory Plan, Hughes, in substance, illegally took for its own use that Plan's entire surplus.

Hughes' diversion of Contributory Plan assets to pay a separate corporate debt was forbidden by 29 U.S.C. §§ 1103, 1104 and 1106. To conceal the substance of its actions, Hughes mislabeled the Contributory Plan and new noncontributory plan two "benefit structures" of one plan. The 1991 Restatement was a sham transaction that disguised two plans as one.

Whether the Contributory Plan and the noncontributory plan to which the older Plan's assets are being diverted are distinct plans as plaintiffs allege cannot be decided on a motion to dismiss. Precedent dating at least to *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), shows the criteria for judging when a "plan" exists: ascertainment of the benefits provided, beneficiaries, source of funding, and procedure for paying benefits. Whether a plan exists in light of these criteria has repeatedly been found a factual question. Using these criteria, the Contributory Plan and new retirement plan are plainly distinct enough so that a claim that there are two plans cannot be dismissed.

Petitioners stress that defined benefits are being paid. The independent force of §§ 1103, 1104 and 1106, especially for assets from employee contributions, is clear from ERISA's text, structure and legislative history. Had Congress only wished to require that defined benefits be paid, there would have been no reason for § 1103. Plans could have been regulated like banks and insurance companies which are required to keep promises but do not hold all assets in trust. Far from doing that, ERISA expressly differentiates plans from insurance companies.

That plan amendments are not generally fiduciary acts is also no basis to dismiss this complaint. § 1103's reach is not limited to fiduciary acts. As for §§ 1104 and 1106, *Lockheed* makes clear that implementing an amendment may be a fiduciary act even when adopting the amendment is not. Sham transactions are not sanitized by calling them "amendments."

2. Plaintiffs seek an order compelling Hughes to use the means for plan termination of Title IV, ending with distribution of surplus under § 1344. The issue for this Court is whether an employer can be compelled to use Title IV procedures. Whether the district court should do so in this case depends on factual questions not yet developed.

Petitioners admit that courts can enforce a contract by ordering plan termination. In doing so, courts apply common-law contract principles, and have the same power when applying trust principles. By closing participation in the Contributory Plan, Hughes created an actuarial certainty that a large part of its assets, including those from employee payments, would never be used for the Contributory Plan's beneficiaries. Common-law courts in such situations ordered trusts terminated and their assets equitably distributed. For a pension trust, Title IV and its § 1344 establish the means of termination and how assets are equitably allotted. A court can order those means to be used.

3. Since Hughes threatens rights made nonforfeitable by § 1053, the claim under that section cannot be dismissed.

ARGUMENT

I. THE COMPLAINT STATES A VALID CLAIM UNDER ERISA'S TRUST, ANTI-INUREMENT, FIDUCIARY AND PROHIBITED TRANSACTION PROVISIONS.

A. The 1991 restatement was a sham designed to evade ERISA.

In substance, what Hughes did in this case was to create a new pension plan for non-participants in the Contributory Plan -- announced as a "new retirement plan... paid for entirely by Hughes" (J.A. 198, 201) -- , then dip into the Contributory Plan's coffers to meet this separate corporate debt. Doing this saved Hughes hundreds of millions or even billions of dollars which it would otherwise have had to pay to keep its promise to participants in the noncontributory plan. Instead, payment is coming from assets of the Contributory Plan, including those attributable to employee contributions.

To insure the availability of the *entire* Contributory Plan surplus (some of which might otherwise have been needed for benefits to new Contributory Plan participants), Hughes capped that Plan's potential liabilities by barring new participants. The Contributory Plan's assets are so large that to an actuarial certainty, they will never be used for benefits to current Contributory Plan participants, and no new participants can join. If not (improperly) diverted to other uses by Hughes, the assets would simply grow forever. The Contributory Plan has been rendered a "wasting trust," one not being used for its intended purpose.

What Hughes should have done, once the Contributory Plan became a wasting trust as a result of the bar on new participation, was to terminate that Plan through the means described in Title IV. Had Hughes done so, however, it would have had to distribute surplus to employees under § 1344, and pay a tax under the Code's § 4980 on any funds which Hughes recouped. This would have eliminated most or all of the profit Hughes sought by using Contributory Plan assets to meet Hughes' separate debt. By *not* using Title IV means to terminate the Contributory Plan, Hughes, in substance, illegally recouped for its own use the entire surplus.[6]

Hughes' diversion of Contributory Plan assets to pay a separate corporate debt was forbidden by §§ 1103, 1104, and 1106. § 1103 has an exception for assets that revert to the employer on plan termination, but reversion is impermissible for assets attributable to employee contributions. It is a *per se* breach of § 1106 for a fiduciary to use a plan's assets for the employer rather than the plan's participants.

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[6] While the case was pending, Hughes' shareholders even more directly profited from surplus assets of the Contributory Plan. As previously stated, Hughes merged with Raytheon. The "sales price" for the merger surely reflected that Hughes was paying its debt to the noncontributory plan with the Contributory Plan's money.

Had Hughes openly announced that the administrator of the Contributory Plan would use its assets to meet Hughes' debt by paying the noncontributory plan money owed by Hughes, courts would have had no difficulty finding a breach of ERISA. The administrator of the Contributory Plan would clearly have violated §§ 1103, 1104 and 1106.[7] Similarly, had Hughes announced that it was terminating the Contributory Plan but did not wish to distribute surplus to employees nor to pay tax on what Hughes recouped, the PBGC and Internal Revenue Service would have had no difficulty finding a breach of § 1344 and the Code's § 4980.

Hughes sought to conceal the substance of its actions by naming the Contributory Plan and noncontribory plan two "benefit structures" of a single plan. By stapling both to one document, which it styled an "amendment" of the Contributory Plan, Hughes sought to immunize its actions from review. In short, the 1991 Restatement was a sham transaction which disguised two plans as one to try to hide the transfer of assets from one plan to the other.

In *Lockheed*, this Court held that it was not a fiduciary act for the plan sponsor to adopt a lawful amendment improving benefits for some participants in a noncontributory pension plan,

[7] As *Lockheed* recently explained, § 1106 bars

> "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arms-length.... [:] uses of plan assets that are potentially harmful to the plan." 517 U.S. at 893.

Subject to exemption under § 1108, such transactions are prohibited generally, even if in a specific case there is no harm. See *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 160 (1993). Regardless whether the Contributory Plan's ability to pay benefits was threatened by diversion of assets to the noncontributory plan, it is obvious that in general, to have a plan pay its sponsor's unrelated debts risks plan underfunding.

and that it was not a breach of fiduciary duty for those administering the plan to implement the amendment by paying benefits. The Court observed that nonfiduciary provisions of ERISA (such as § 1103) do govern plan amendments, 517 U.S. at 891, and that paying benefits in a "sham transaction, meant to disguise an otherwise unlawful transfer of assets," might indeed be a fiduciary breach, *Id.* at 895 n. 8.[8] Hughes' scheme, described above, is a perfect example of such a "sham transaction." In implementing it, Hughes as administrator of the Contributory Plan breached its fiduciary duty.

Petitioners, to repeat, seek to obscure the facts alleged. The Ninth Circuit did *not* hold that Hughes "unwittingly" or "accidentally" created a new plan. Pet. Brf. 28, 34. The actions challenged bear no resemblance to plan amendments which according to the ERISA Industry Committee, are "routinely... adopted to alter, and typically to improve, plan benefits for participants." ERISA Industry Committee Brf. 17. Rather, Hughes schemed to evade ERISA's prohibition on using Contributory Plan assets to meet Hughes' debt to the separate plan which had been trumpeted by Hughes itself as a "new retirement plan... paid for entirely by Hughes." J.A. 198, 201. The 1991 Restatement was a sham, describing as one plan what was really two.

B. Whether there is one plan or two is a factual question.

§§ 1103, 1104 and 1106 require a plan's assets to be held in trust for the sole benefit of participants. Using trust assets to pay the employer's separate obligations under a different plan is a clear

[8] The opinion also described a "sham transaction" as "cover for an illegal scheme." This Court has often used the word "sham" with that connotation. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

breach of ERISA's trust, anti-inurement and prohibited-use provisions. To find otherwise would sanction robbing Peter to pay Paul.[9]

This has been clear at least since *Cutaiar v. Marshall*, 590 F.2d 523, 528-30 (3d Cir. 1979), and *Donovan v. Mazzola*, 716 F.2d 1226, 1238 (9th Cir. 1983), found it violated § 1106 for one plan to deal with another that did not have identical participants.[10] The Department of Labor, as well as the court, saw a per se violation "[i]f there is a single member who participates in only one of the plans." *Cutaiar, supra. Cf. Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571 n. 12 (1985) (trustee attempt "to expand plan coverage beyond the class defined in the plan's terms" would breach § 1104).

That the diversion of assets to a different plan breaches § 1103 is evident from the insertion in § 1103(c) of an exception "under section 420 of title 26." § 420 lets pension plans transfer assets to a special account used to pay the employer's debt to retirees for health benefits. Such benefits must be paid promptly, with unused amounts returned at year's end to the pension plan. Payment can be made only to retirees already entitled to benefits under the pension plan as well as to health benefits; other limits include a requirement that employers not reduce the health benefits provided for five years. § 420(c)(1)(B), (c)(3) and (e)(1)(C). Even

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[9] "To rob Peter and pay Paul is said to have derived its origin when, in the reign of Edward VI, the lands of St. Peter at Westminster were appropriated to raise money for the repair of St. Paul's in London." John Heywood, *Proverbes* (1546).

[10] In *Cutaiar*, a union pension fund lent money to a union welfare fund; there was "no hint of self-dealing, no trace of bad faith. .. [T]he terms of the transaction were fair.... [A] great many employees participate in both plans." The loan was nonetheless a prohibited use of plan assets.

with all these limits, such use of plan assets for a non-plan employer benefit obligation falls within § 1103's ban on inurement to the employer. If it did not, there would have been no reason to add an express exception to § 1103.

Petitioners' claim that assets are being used to fund "benefits to plan participants" (Pet. Brf. 22) rests on a sharply disputed factual premise: that the Contributory Plan and the "new retirement plan" which Hughes announced in 1990 are not two plans but two "benefit structures." Petitioners echo Judge Norris:

> "The focus of our inquiry under ERISA's anti-inurement provision must be whether Hughes used Plan assets for a purpose other than the payment of benefits to Plan participants. The answer to that question is clearly no." Pet. Brf. 26-7, quoting Pet. App. 39a.

But if the Contributory Plan and "new retirement plan" are two separate plans, the answer, which petitioners agree is decisive, is "clearly yes." If there are two plans, *Lockheed*'s holding that it is proper for a plan to pay "benefits to the participants pursuant to its terms," 517 U.S. at 895, has no relevance.

Judge Gadbois ruled that "upon the face of Plan documents" the contributory and noncontributory "benefits structures" were not two plans. Pet. App. 58a. The face of Plan documents is obviously no basis to dismiss a complaint whose essence is that those documents are a sham meant to cover the reality which Hughes itself had earlier, more candidly, described when it announced "a new retirement plan" and contrasted "the existing retirement plan and the new plan." J.A. 198.

While 29 U.S.C. § 1002(3)'s definition of "plan" is not illuminating, ample precedent dating at least to *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982), shows the

criteria for judging when a "plan" exists: ascertainment of the benefits provided, the beneficiaries, the source of funding, and the procedures for receiving benefits. *See, e.g., McDonald v. Provident Indemnity Life Insurance Co.*, 60 F.3d 234, 235 (5th Cir. 1995); *Grimo v. Blue Cross/Blue Shield of Vermont*, 34 F.3d 148, 151 (2d Cir. 1994). Whether a plan exists in terms of these criteria has repeatedly been found to be a factual question. *See, e.g., Deibler v. Food and Commercial Workers Local* 22, 973 F.2d 206, 209 (3d Cir. 1992); *Wickman v. Northwestern National Insurance Co.*, 908 F.2d 1077, 1082 (1st Cir. 1990); *Credit Managers Association v. Kennesaw Life and Accident Insurance Co.*, 809 F.2d 617, 625 (9th Cir. 1987). The table above contrasting the Contributory Plan and noncontributory plan -- drawn from Hughes' brochure announcing its "new retirement plan" (J.A. 198) -- shows that the two are (at the least) distinct enough under the *Dillingham* criteria so a claim they are two plans cannot be dismissed.

Implicitly recognizing that the existence of a factual question, whether there is one plan or two, is fatal to their position, petitioners argue that since "all assets in the Hughes plan are available to pay benefits under both the contributory and non-contributory benefit structures," both must be "a single plan as a matter of law." Pet. Brf. 27-8. Petitioners cite two regulations, 26 C.F.R. § 1.414(l)-1(b)(1) and 29 C.F.R. § 2520.102-4, which say that the existence of several benefit structures does not *preclude* finding a single plan. Whatever its relevance if plaintiffs sought judgment on the pleadings, this plainly does not support the defendants' claim that there is one plan as a matter of law.

26 C.F.R. § 1.414(l)-1(b)(1) also says, "A plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan." Petitioners say that this definition applies because "all assets in the Hughes plan are available to pay benefits under both the contributory and non-contributory benefit structures." Pet. Brf. 27. But as their own next sentence says, a crux of the complaint is

that such use of the assets is illegal. If there are two plans, based on facts recognized as determinative in *Dillingham* and other cases, Contributory Plan assets are *not* legally available to the noncontributory plan. Petitioners' argument is circular, based on the very factual claim (that there is one plan) which is in dispute.

It is not surprising that § 1.414(l)-1(b)(1) is not illuminating. By its terms, it applies only "[f]or purposes of" the Code's § 414(l) dealing with "the combining of two or more plans into a single plan."[11] § 414(l), according to § 1.414(l)-1(b)(1), does not even apply "unless more than a single plan is involved." Hughes is arguing that there have never been two plans.

The goal of § 414(l) and § 1.414(l)-1(b)(1) is to protect employees against having their entitlements reduced when two plans merge. Other contexts call for other approaches.[12] In general, as the Department of Labor has put it in an opinion consistent with court precedent already discussed, "whether there is a single plan or multiple plans is an inherently factual question." Opinion No. 96-16A, 1996 WL 491410 (E.R.I.S.A).

Examination of 29 U.S.C. §§ 1053 and 1054 confirms that Hughes itself knew the Contributory Plan and "new retirement plan" were separate plans. § 1054(c), which tells how to compute

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[11] 29 U.S.C. § 1058 is a companion, "labor" section of the Code's § 414(l). *Cf. Keystone Consolidated*, 508 U.S. at 160 (Congress adopted ERISA's "labor" and Code provisions in tandem).

[12] For example, 26 C.F.R.§1.401(a)(4) requires "disaggregating" what would for some purposes be one "plan," when applying nondiscrimination rules. The Code's § 4980(d)(5) treats what would for some purposes be two "plans" as one, when deciding if there is a "qualified replacement plan" after plan termination. *Cf. Steelworkers v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1290 (3d Cir. 1983) (regulations "serve a limited purpose... recognizing the dangers that employer manipulation of pension benefits may create").

the rights which § 1053 requires be nonforfeitable, differentiates defined benefit and defined contribution plans. Basically, the latter use actual investment earnings to compute nonforfeitable rights; the former use an imputed, usually lower rate of interest. But under § 1054(c)(4), if a defined benefit plan permits voluntary employee contributions, "the portion of an employee's accrued benefit derived from such contributions shall be treated" as if it arose in a defined contribution plan.

In the historic Contributory Plan, employee payments were a condition of participation: mandatory, for purposes of § 1054. But if it were true, as petitioners now claim, that the 1991 Restatement established a doublebreasted plan only one of whose "benefit structures" was contributory, this hybrid "plan" would have to be classified under § 1054 as one that "permits voluntary employee contributions." Under § 1054(c)(4), participants in the "contributory benefit structure" would have nonforfeitable rights based on actual plan earnings, as if they were participants in a defined contribution plan. The 1991 Restatement shows nothing of the kind. Relevant sections of Exhibit A (J.A. 135 and 148), like those of the old Contributory Plan (J.A. 72, 89), use an imputed interest rate. Hughes itself knew the Contributory Plan and noncontributory plan were separate: otherwise, § 1054(c) would have required different treatment.

In footnotes, petitioners suggest that even if there were two plans, 29 U.S.C. § 1058 authorized Hughes

> "to spin off participants in the non-contributory benefit structure -- along with surplus assets -- from the plan as long as participants in the contributory benefit structure continued to receive their defined benefits." Pet. Brf. 29 n. 6; *cf.* Pet. Brf. 26 n. 3..

The claim, which was not encompassed by the petition for certiorari, is also irrelevant and spurious. Hughes could not

possibly "spin off participants" who were never in the Contributory Plan. Nor does § 1058, as petitioners claim, let employers shift assets between plans as long as defined benefits are not affected. The Code's § 414(l) requires that even in an actual spinoff, each new plan receive "the applicable percentage of excess assets."[13] The complaint does not allege nor does Hughes claim that there has been a spinoff or a plan merger. A different factual question is decisive: whether the Contributory Plan and "new retirement plan" announced by Hughes are one plan or two.

C. Petitioners' arguments are wrong.

1. 29 U.S.C. §§ 1103, 1104 and § 1106 are express, independent statutory requirements.

§ 1103's anti-inurement rule, § 1104's fiduciary clause, and § 1106's bar on even "indirect... use by or for the benefit of a party in interest of any assets of the plan," are independent provisions of ERISA. They apply to *all* assets of a plan, not just those needed for promised benefits. A basic premise of petitioners' argument -- that the only obligation of a defined benefit plan is to pay the defined benefit (Pet. Brf. 1-2, 10, 13, 43) -- is wrong.

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[13] This means, as explained in 26 C.F.R. § 1.414(l)-1(b)(5) and (n), enough to fund "benefits on a termination basis in the plan before the spinoff," defined as what § 1344 would have required be paid had the plan terminated: not just defined benefits, but also other entitlements such as employees' statutory share of a plan surplus. *See Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 509 (2d Cir. 1994), (§ 1058, in a spinoff, requires allocation of fund assets in strict accordance with § 1344). *Cf. Holland v. Valhi Inc.*, 22 F.3d 968, 972 (10th Cir. 1994) (employer spinning off a plan could not allocate almost no surplus assets to participants who made 25% of contributions, even if this was the result of a calculation method presumptively correct under PBGC regulations).

ERISA does *not* only require that employers "honor their promises." Pet. Brf. 11. § 1103 requires, in addition, that plan asset s be held in trust and never inure to the employer's benefit. While § 1103 states an exception for assets reverting to the employer under § 1344 on plan termination, that exception never extends to assets attributable to employee contributions. For such assets, § 1103 is ironclad.

That ERISA's goals include protecting promised pensions does not mean specific statutory requirements can be ignored. "Vague notions of a statute's 'basic purpose' are nevertheless inadequate to overcome the words of the text regarding the specific issue under consideration." *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993). Nothing in §§ 1103, 1104 and 1106 suggests, much less says, that their requirements are excused if a plan pays promised defined benefits. The sections provide much of the basis for this Court's recognition that "ERISA abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). §§ 1104 and 1106 "insulate the trust from the employer's interest," *NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 (1981), by requiring not just that promised benefits be paid, but that "decisions must be made with an eye single to the interests of the participants." *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982). *Cf. Mazzola*, 716 F.2d at 1231. § 1106, as noted earlier, lists transactions which breach fiduciary duties *per se*, even if in a particular case they cause no harm. *Keystone Consolidated*, 508 U.S. at 160.

§§ 1103, 1104 and 1106 are all enforced even when defined benefits have all been paid. In *Clothing & Textile Workers v. Murdock*, 861 F.2d 1406 (9th Cir. 1988), plan assets were invested in stock in which the employer had an interest. The employer, after terminating the plan, recouped a surplus including profits from resale of the stock. Not only had all promised benefits been paid, but the investment at issue had turned out well, yet the court

applied §§ 1103, 1104 and 1106 to hold that "a district court may impose a constructive trust on the ill-gotten profits and distribute them to plan participants and beneficiaries, even after they have received their actuarially vested plan benefits." *Id.* at 1408. *Cf. Leigh v. Engle*, 727 F.2d 113, 121-2 (7th Cir. 1984).

Petitioners imply that applying trust principles to a defined benefit plan means treating it like a defined contribution plan. Pet. Brf. 13, 33. §§ 1103, 1104 and 1106 govern both types of plan. In a defined contribution plan, money is held for individual participants. Assets of defined benefit plans are held for participants as a group, but held in trust nonetheless. It does not follow that assets, whether or not needed for defined benefits, may inure to the employer. The law expressly says that they may not.

2. The independent force of §§ 1103, 1104 and 1106, especially for assets attributable to employee contributions, is clear from ERISA's structure and history.

The independent force of §§ 1103, 1104 and 1106, especially for assets attributable to employee contributions, is clear not only from the statutory text, but also from ERISA's structure and legislative history. Petitioners argue repeatedly that ERISA was a compromise. Pet. Brf. 11, 14. In many respects, it was. Congress, for example, balanced the desirability of high vesting and funding standards for plans against the danger of discouraging employers from offering plans at all. *See* 2 Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, *Legislative History of the Employee Retirement Income Security Act of 1974* (hereinafter "*Legis. Hist.*") 2604, 3311. *Cf.* 2 *Legis. Hist.* 1834, 3 *Legis. Hist.* 3515 (discussing protection for surviving spouses). There was no compromise, however, about extending trust protection to assets attributable to employee contributions.

Even before ERISA, trust law protected the assets of most pension plans. As this Court said in *Varity Corp. v. Howe*, 516

U.S. 489, 496 (1996), trust-law requirements, under state common law, "governed most benefit plans before ERISA's enactment." The Code, too, conferred some trust protection on most employee plans.[14] Besides state common law and the Code, collectively bargained plans were governed by the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), which conferred trust protections drawn from common law. *See Amax Coal Co.*, 453 U.S. at 329-31. Taft-Hartley required that plans be jointly run by unions and employers, to stop unions from using plan assets as a "war chest." 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947* 1312.[15]

What was new in § 403 was the requirement that assets of *every* employee benefit plan be held in trust and *never* inure to employers' benefit. Every proposed version of ERISA included these provisions,[16] whose purpose was threefold, as legislative

[14] The Code's § 401(a)(2) bars employers from recouping assets of tax qualified pension trusts until they are terminated. When ERISA was passed, the extent of employers' recoupment right under § 401(a)(2) even on termination was unclear. *See* Norman P. Stein, *Reversions from Pension Plans: History, Policies, and Prospects*, 44 Tax L.Rev. 259, 261, 279-81, 290-7 (1989).

[15] Specifically, Congress was angered by a United Mine Workers contract providing for payments

> "for indiscriminate use for so-called welfare purposes.... [I]f any such huge sums were to be paid, representing as they do the value...which could otherwise be paid... as wages, the use of such funds [should] be strictly safeguarded." *Id.* at 458.

[16] *See, e.g.*, H.R. 2 introduced Jan. 1, 1973, 1 *Legis. Hist.* 41; S. 4 introduced Jan. 4, 1973, 1 *Legis. Hist.* 169-70; S. 1179 introduced Mar. 13, 1973, 1 *Legis. Hist.* 946; S. 1557 introduced Apr. 12, 1973, 1 *Legis. Hist.* 307; H.R. 4200 twice passed by the Senate, 2 *Legis. Hist.* 2055, 3 *Legis. Hist.* 3597; H.R. 12906 introduced Feb. 20, 1974,
(continued...)

history makes clear. First, Congress wished *all* plans to be protected by trust law. Second, it feared that precepts "developed in the context of testamentary and inter vivos trusts... with an attendant emphasis on the carrying out of the instructions of the settlor" left too much room for exculpatory clauses and similar devices. Trust principles were therefore to be applied in light of the special nature of employee benefit plans, the better to "protect the interests of plan participants." Finally, Congress hoped to unify law that "may differ from State to State." 1 *Legis. Hist.* 275; *cf.* 1 *Legis. Hist.* 591, 615; 2 *Legis. Hist.* 2351-2, 2358-9; 2 *Legis. Hist.* 3308. The only "compromise" struck in extending trust protection to plan assets is § 1344 allowing employer recoupment on plan termination. § 1103 is subject to an exception for surplus assets derived from employer contributions only.

Even this exception has repeatedly been narrowed. There is a "presumption against any reversion," which is allowed only on "specific and affirmative compliance" with the statute. *Rinard v. Eastern Co.*, 978 F.2d 265, 268 (6th Cir. 1992). Since employer payments to plans are tax-deductible, reversions of surplus on plan termination in effect let employers, under the guise of funding employee benefits, defer taxation on income which they later recoup. *See* Norman P. Stein, *Reversions from Pension Plans: History, Policies, and Prospects*, 44 Tax L. Rev. 259 (1989). By contrast, employee payments to plans must be made with after-tax dollars. To limit employer use of plans as tax shelters and encourage use for plan participants even of those plan assets derived from employer contributions, Congress repeatedly amended ERISA and the Code.

When first enacted in 1986, the Code's § 4980 imposed a 10% tax on assets recouped by an employer on plan termination. The rate was raised to 15% in 1988, and in 1990 -- just before

[16](...continued)
2 *Legis. Hist.* 2810-11, 2817.

Hughes adopted the 1991 Restatement -- to 20%, 50% unless the employer uses 25% of its potential reversion to benefit participants in the terminated plan. § 4980(d). These taxes are in addition to ordinary income tax. Thus for assets derived from employer payments, Congress has balanced interests as with other aspects of ERISA. For assets attributable to employee contributions, the protection of § 1103 is absolute.

Employer appropriation of plan surplus was one of the specific abuses which inspired § 1103. Lawmakers repeatedly mentioned the Elgin Watch Co., which after years in which only employees contributed to its pension plan, decided to terminate the plan to pocket its surplus. *E.g.*, 1 *Legis. Hist.* 1791. As one Congressman explained, "At the heart of the Elgin controversy was the question, 'who should be entitled to the excess funds' -- the pensioners or the company, which had come under the direction of new management." 3 *Legis. Hist.* 4710-11. In direct response, lawmakers sought "explicit provisions guaranteeing the rights of employees to some or all of the surplus upon termination of overfunded plans." *Retirement Income Security for Employees Act, 1973: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess., 193-202. The ultimate result was § 1344(d).

Petitioners, like Judge Norris, believe that in "economic reality," it should not matter

> "whether an employee makes contributions to a plan directly, or... indirectly through the employer. Either way, the contributions are the economic product of the employee's services." Pet. Brf. 20; Pet. App. 37a.

The short answer is that Congress saw a difference, "markedly distinguish[ing]," for example, "surplus assets... attributable to employee contributions and those attributable to employer

contributions." *Borst v. Chevron Corp.*, 36 F.3d 1308, 1315 (5th Cir. 1994).[17] Denial of a difference shows faulty reasoning and arrogance. Employees contributing to the Contributory Plan paid out of their own wages. That Hughes paid the wages no more makes employees' (after-tax) contributions identical to Hughes' (tax-deductible) contributions, than the fact that workers buy a car with wages means that Hughes bought them the car.

Had Congress in ERISA wished simply to require that defined benefits be paid, it could have said so. Fiduciary requirements would have had, at most, minor importance, since substantive requirements for plans, especially for plan funding, would have gone far to insure payment of benefits. There would have been no reason to require that plan assets be held in trust and never inure to the employer's benefit: no reason for § 1103.

This Court has contrasted ERISA fiduciaries' duty to act "*solely* in the interest of the participants" with an insurance company's duty "to consider the interests of all of its contractholders, creditors and shareholders." *John Hancock Mutual Life Insurance Co. v. Harris and Trust Savings Bank*, 510 U.S. 86, 97 (1993). Insurers promise defined benefits, are required to keep such promises, and are strictly regulated by state law; yet no one has ever suggested that their assets are held in trust and may not inure to the insurer's benefit. On the contrary, "[m]ost states treat the relationship between insurer and insured as a matter of contract, not a fiduciary relationship," *Hancock*, 510 U.S. at 119 (Thomas, J., dissenting), and the goal of most insurance companies is to make a profit.

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[17] *See also Chait v. Bernstein*, 835 F.2d 1017, 1025-6 (3d Cir. 1987), stressing that a plan whose surplus assets were being allowed to revert to the employer was wholly employer-funded, and contrasting *Delgrosso v. Spang and Co.*, 769 F.2d 928 (3d Cir. 1985), in which an employer that contributed nothing to a plan after it became a defined benefit plan was denied recoupment.

Similar rules apply to banks, and the PBGC was "modeled after the Federal Deposit Insurance Corporation" and federal agencies insuring savings and loans associations and brokerage houses. *Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 507 (2d Cir. 1994); 1 *Legis. Hist.* 1636, 3 *Legis. Hist.* 4794-5. Congress could have protected pension plans, like banks, without a sweeping trust requirement, but it chose not to. It discarded the idea of using "laws affecting insurance, banking and securities" to define fiduciary duties. 1 *Legis. Hist.* 617-8.

Far from regulating plans as states regulate insurance companies, Congress expressly declared in 29 U.S.C. § 1114(b) that an employee benefit trust shall *not* be deemed "to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking" under state law. § 1103(b) excepts from § 1103's requirement that plan assets be held in trust, "assets of a plan which consist of insurance contracts," assets of insurance companies with which plans deal, and "any assets of a plan which are held by such an insurance company." ERISA benefit plans are *not* profit-seeking insurance companies, but trust funds existing for their participants' sole benefit.

Petitioners argue that since an employer bears "the financial burden" of contributing to a plan if plan assets decline, it should "be entitled to the financial benefits" if assets rise. Pet. Brf. 33. Like Judge Norris in dissent, petitioners rely heavily on *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994). That case likened workers who fund a defined benefit plan to

> "persons who purchase annuity contracts from insurance companies. They obtain a guaranteed stream of payments; the insurer (or, with pension plans, the employer) bears the investment risk." *Id.* at 1186.

§ 1103, however, means precisely that an employer which sponsors a pension plan is *not* thereby establishing a sideline insurance business in which it bears investment risk in exchange for a legal or beneficial right to plan assets. *Johnson*'s notion that "investment risk" entitles employers to profit from trust assets was not shared by Congress when it passed ERISA.[18] It has been specifically rejected by both the PBGC, and Congress when amending ERISA in 1987.

In adding to the statute § 1344(d)(3)'s express reservation to employees of surplus attributable to their contributions, Congress codified a right which the PBGC, affirmed by the D.C. Circuit, had already recognized. In doing so, the agency and court rejected arguments that "the employer bears the entire investment and actuarial risk"of declines in plan assets and therefore should profit from their rise. *Bridgestone/Firestone, Inc. v. PBGC*, 892 F.2d 105, 107 n. 2, 111 (D.C. Cir. 1989). Both when it originally passed ERISA and when it adopted the agency's view in a 1987 amendment, Congress rejected petitioners' argument about investment risk.

3. That amendments are not generally fiduciary acts is no basis to dismiss claims under §§ 1103, 1104 and 1106.

Petitioners argue that the complaint should be dismissed because plan amendments are not fiduciary acts. Pet. Brf. 13, 15-6,

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[18] During Congressional debate, opponents of the PBGC insurance program argued that it would discourage defined benefit plans because employers required to assume primary liability for PBGC-guaranteed benefits would no longer be able to limit their obligations: "[I]f the pension trust assets fall in value... , the employer will have to make up the difference." 2 *Legis. Hist.* 3389 *cf.* 2 *Legis. Hist.* 3398, 3463, 3476, 3 *Legis. Hist.* 3534-5, 4705. This is essentially *Johnson*'s argument about "investment risk." Congress ultimately passed ERISA with two dissenting votes. No one during debate said that employers' risk must be balanced by potential gain.

19. But § 1103, as the Ninth Circuit found, applies "whether or not the alleged conduct implicates ERISA's fiduciary obligations." Pet. App. 8a.[19] The United States agrees. U.S. Brf. 21. § 1103 is a structural, not just a fiduciary provision of ERISA: an example of the "other requirements" which *Lockheed*, 517 U.S. at 891, recognized govern plan amendments. That Hughes was plan sponsor did not entitle it to adopt an amendment violating § 1103.

Claims under §§ 1104 and 1106, which require a finding of fiduciary status, are also enforceable. Even if Hughes as plan sponsor was not a fiduciary when executing the 1991 Restatement, Hughes as administrator *was* a fiduciary when implementing and communicating about that document.

Lockheed cautioned that those implementing a plan amendment should not be found to have breached § 1106 without first "making the requisite finding of fiduciary status," but did not itself address the defendants' status since in any event, § 1106 had not been breached. 517 U.S. at 892. By treating separately a claim that implementation (as distinct from adoption) of an amendment breached fiduciary duty, *Lockheed* made clear that even an employer free to amend a plan may violate ERISA when implementing the amendment. Here Hughes, the Contributory Plan's administrator as well as sponsor (J.A. 21), breached §§ 1104 and 1106 by "utilizing excess Plan assets... for the exclusive benefit of defendant Hughes," and by "divert[ing] assets of the Plan to pay benefits to participants of the new non-contributory

[19] The petition for certiorari did not appear to challenge this holding. After certiorari was granted, petitioners added a new "question presented" (the second), and extensive argument referring to ERISA's anti-inurement clause. Pet. Brf. i, 22-7. *Lockheed* does not discuss § 1103 at all. On remand the Ninth Circuit found that Lockheed had not breached § 1103 since "plan assets were paid only to plan participants" and "Lockheed's Plan was a noncontributory pension plan." *Spink v. Lockheed Corp.*, 125 F.3d 1257, 1261 (9th Cir. 1997).

plan." J.A. 27, 30. Hughes as administrator also lied to participants in both plans, falsely telling them the new noncontributory plan would be "paid for entirely by Hughes." J.A. 201. Whether or not amending the Contributory Plan, by itself, was a fiduciary act, Hughes was certainly a fiduciary when as administrator, it misled participants about the amendment, and when it implemented the amendment by diverting Contributory Plan assets to pay Hughes' separate debt to the new noncontributory plan.

This Court stressed in *Firestone*, 487 U.S. at 112, 113, that a fiduciary in doubt about his duties "can protect himself by obtaining instructions from the court," and that a fiduciary is not

> "one who exercises *entirely* discretionary authority or control. Rather, one is a fiduciary to the extent he exercises *any* discretionary authority or control."

Cf. Keystone Consolidated, 508 U.S. at 164 (1993) (Stevens, J., dissenting) (trustee has right and duty to refuse plan sponsor's disadvantageous property transfer). *Varity*, 516 U.S. at 498, deferred to "factual findings" that an employer exercised discretion when communicating about an amendment as administrator and therefore, was a fiduciary. Judge Gadbois, by contrast, dismissed the complaint without a factual record and without even discussing whether Hughes as administrator of the Contributory Plan lied to participants and diverted Contributory Plan assets to improper use. Pet. App. 57a-58a, 60a.

The Ninth Circuit correctly found that the Plan's contributory nature supports claims of fiduciary breach. Not only was diversion of assets to meet a separate employer debt a *per se* breach of §§ 1104 and 1106, but Hughes as the administrator effecting such diversion breached § 1104 for a further reason. This Court has recognized that fiduciary duties under ERISA extend to future interests. *Varity*, 516 U.S. at 504. Besides their beneficial

interest in plan assets, participants in a contributory plan have a remainder interest in its surplus assets, under § 1344. On termination of the trust § 1344, as already discussed, lets employers recoup, at most, surplus derived from their own payments. Other remainder rights belong to the employee contributors -- a rule that like the rest of ERISA, has its roots in common law.[20]

A trust fiduciary's duty extends to remainder interests. *Bogert on Trusts & Trustees* § 541 at 163-6. *Cf. Restatement of Trusts* 2d, §§ 183, 232; *Scott on Trusts* § 183 at 560 (trustee who is also a beneficiary can be removed for favoring his own interest); 90 *Corpus Juris Secundum*, Trusts § 247 at 235-6 (if interests "are so conflicting that the fiduciary cannot deal fairly with respect to them, he cannot properly act without applying to the court"). The fiduciary may not ignore remainder rights. *See, e.g., Dennis v. Rhode Island Hospital Trust National Bank*, 744 F.2d 893, 896 (1st Cir. 1984) (Breyer, J.); *Matter of Great Northern Iron Ore Properties*, 263 N.W.2d 610, 621-2 (Minn. 1978); *DuPont v. Delaware Trust Co.*, 320 A.2d 694, 699 (Del. 1974); *Moore v. Smith*, 235 S.E.2d 102, 106 (N.C.App. 1977). At least when a conflict is between participants and the employer, ERISA fiduciaries' duty has been found to require them to protect

[20] *See Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 464 (4th Cir. 1989). The Supreme Court of Canada has lamented the lack of a Canadian statute specifying entitlements on pension plan termination but suggested, applying common law, that where both

> "employers and employees are (by virtue of their contributions) settlors of a trust, surplus funds remaining on termination can revert on a resulting trust to both employers and employees in proportion to their respective contributions."

Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611. That is the same result required by § 1344.

participants' termination interest in plan surplus. *Struble v. New Jersey Brewery Employees' Welfare Fund*, 732 F.2d 325 (3d Cir. 1984); *cf. Mahoney v. Board of Trustees*, 973 F.2d 968, 972 (1st Cir. 1992) (Breyer, J.) (contrasting conflict between groups of plan participants). Hughes, seeking to evade employee remainder rights, diverted surplus of the Contributory Plan to its own use. Dissipating assets in derogation of a protected remainder interest is grounds to find a breach of fiduciary duty.

Lockheed reached its conclusion that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions" by extending a rule adopted for welfare plans in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). 29 U.S.C. § 1002(21), *Lockheed* explained, has one definition of "fiduciary" for all plans, and employers designing plans are generally "analogous to settlors of a trust." 517 U.S. at 891.

§ 1002(21) recognizes fiduciary status "to the extent" of "any... control respecting... disposition" of plan assets. These words, as *Varity* recognized, "are not self-defining." Some circumstances fall "clearly neither within nor outside of the common understanding" of the words, and in those circumstances, courts "look to the common law." 516 U.S. at 502. Factual questions must be addressed in "the specific context in which the events of [a] case occurred." *Id.* at 498-503. *Cf. Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992) (ERISA's unclear definition of "employee" implies a common-law test and requires assessment of the whole factual context).

Curtiss-Wright and *Lockheed* involved, respectively, a welfare plan and an employer-funded pension plan. A contributory pension plan differs from both. Welfare plans (unless collectively bargained) are nearly always pay-as-you-go, without significant assets. Pension plan assets attributable to employee contributions enjoy more protection under § 1103 than those derived from employer payments. Amendment of a welfare plan can almost

never be said to "dispose of" current plan assets. For a noncontributory pension plan like Lockheed's, but not for a contributory plan, there is an exception to § 1103. Even if actions with respect to all three types of plan are superficially similar, the "extent [of]... control respecting... disposition" of protected assets may be greater for a contributory pension plan than for a noncontributory pension plan or for a welfare plan.

Suppose that instead of half, employees made *all* contributions to a contributory plan. Since 1986, this has been true here. To find that despite § 1103's reservation to employee contributors of both the beneficial and the remainder interest in plan assets, there was no limit to the employer's right to revise such a plan to favor itself, would raise obvious questions about fairness. It is unlikely workers would pay the full cost of a pension to their employer (rather than an insurance company) knowing the employer could change the plan to profit from their payments. The employer would more likely sponsor the plan without any such right, to encourage employee loyalty. J.A. 61.

Lockheed referred to the broad powers of "settlors of a trust." Unlike "fiduciary," "settlor" is not a word which 29 U.S.C. § 1002 defines. As the Ninth Circuit said, when a plan is funded by both the employer and employees they are essentially "*co*-settlors." Pet. App. 14a. Such a description conforms to common law. One who supplies the assets for a trust may be "the settlor, even though in form the trust is created by another person." *Scott on Trusts* § 156.3 at 180 (4th ed. 1987). *Cf. Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1239 (9th Cir. 1990) (employer was not the settlor of a disability fund or entitled to its surplus assets, where employees paid the premiums); *Mine Workers v. Boyle*, 418 F.Supp. 406, 409 (D.D.C. 1976), *aff'd*, 567 F.2d 112 (D.C. Cir. 1977) (employer rather than beneficiaries was the settlor of a fund since "From its inception, the Pension Trust has been non-contributory"); *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 (Sup. Ct. of Canada) ("employers and employees are

(by virtue of their contributions) settlors" of a pension plan). Hughes was a fiduciary and breached its duty.

4. Dicta in *Johnson v. Georgia-Pacific Corp.* should not be followed.

Petitioners rely heavily on *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994). *Lockheed*, 517 U.S. at 891, cited *Johnson* for its analogy "to the settlors of a trust." While *Johnson*, unlike *Lockheed*, involved a contributory plan, its other facts bore no similarity to those here. The plan amendment in *Johnson* enhanced benefits for some plan participants; there was no claim that it "transferred assets from one plan to another or that the asset surplus was used to benefit employees who were not participants of the plan." Pet. App. 17a. While the facts of *Johnson* differ from those here, dicta in *Johnson* ignore § 1103.

Johnson's likening of employers with pension plans to for-profit insurers has already been discussed. Under ERISA, a plan sponsor is *not* in the insurance business. *Johnson*'s discussion of ERISA's definition of "fiduciary" is equally flawed. This Court, as already discussed, has recognized that the words of § 1002(21) must be applied in "the specific context" and "are not self-defining." *Varity*, 516 U.S. at 498, 502. By contrast *Johnson*, 19 F.3d at 1188-9, though admitting that "'use' and 'dispose of' could be synonyms," limited the meaning of "disposition" in § 1002(21)'s to

> "the common transactions in dealing with a pool of assets: selecting investments, exchanging one instrument or asset for another, and so on" -- an interpretation with no basis in ERISA, this Court's opinions or the dictionary.

Johnson argued that when ERISA refers to plan *assets*, it has "nothing at all to say about" plan liabilities. *Id.* at 1189. If that were right, a fiduciary barred from imprudently investing plan

assets, could freely pledge them as security for a personal loan. It is obvious that ERISA does *not* allow plan assets to inure to employer's benefit through increases in plan liabilities. It is also not correct to say, like *Johnson*, that since "[i]n bad times (when declines in the value of assets make plans underfunded) employers must contribute more," it is "asymmetric" not to let them profit from plan surpluses in good times. *Id.* at 1190.

There is no lack of symmetry. In bad times employers contribute more, in good times less. More important, this reduction in contributions is the *only* sense (apart from the express exceptions to § 1103) in which plan surpluses may benefit employers.[21] At best, *Johnson*'s warning that employers will establish fewer plans unless they can do so for profit, 19 F.3d at 1190, is "thoughtful speculation, but speculation nonetheless." *Swidler & Berlin v. United States*, 118 S.Ct. 2081, 2088 (1998).[22] At worst, it exemplifies how an economic theorywhose application in practice is untested can undermine an express statute.

Employers including Hughes establish plans because they believe this helps them attract and retain employees. JA. 61. The trade-off between regulation of plans and employer willingness to sponsor them is one that Congress took into account in ERISA when setting minimum vesting, funding and other standards. It

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[21] It does not follow, as the United States implies, that an employer which "may benefit... by ceasing contributions" should also be free to use surplus assets for a different plan. U.S. Brf. 23. That employers may benefit in one sense but not the other is "merely a necessary consequence of the need to draw a line somewhere." *Geissal v. Moore Medical Corp*, 118 S.Ct. 1869, 1875 (1998).

[22] The answer to a similar concern, that if employers lack access to plan surpluses they will not fund plans adequately, was given in *Amatao v. Western Union International, Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1983): "This concern is diminished by ERISA's provisions insuring at least minimum funding."

does not license courts to redesign the statute. When this Court has said that a flexible legal regime encourages "employers to offer more generous benefits," it has also recognized that ERISA nonetheless limits employer freedom of action and that invoking such freedom "does not, as the Court of Appeals apparently thought, justify a departure from... plain language." *Inter-Modal Rail Employees Association v. Atchison, Topeka and Santa Fe Railway Co.*, 117 S.Ct. 1513, 1516 (1997). Nothing suggests that Congress thought employers should profit from pension trust assets: a practice specifically prohibited by § 1103. "Logic" like *Johnson*'s could equally oppose *any* limit on employer freedom, even enforcement of employer promises. *See* Seth Kupferberg, *Double Effects in Economics and Law, with Special Reference to ERISA*, 73 *Ore.L.Rev.* 467, 500 (1994). Regardless of what a judge might deem wisdom, § 1103 is where Congress drew the line.

With more logic, one can foresee consequences if the complaint here is dismissed. Hughes, as argued above, is accused of precisely the kind of conduct §§ 1103, 1104 and 1106 aimed to prohibit. Like a pre-Taft-Hartley union, it is taking huge sums deducted from employee wages for indiscriminate use. It is evading the tax on employer reversions which Congress increased just before the actions challenged here, appropriating more than the amount of a legal plan reversion, and shifting part of the tax burden to employees who to remain in the Contributory Plan, must continue contributing (for Hughes' use) out of their after-tax wages. Like Elgin Watch, Hughes is using Contributory Plan surplus to pay for "meager pensions to retirees [under the noncontributory plan], and a tax-free bonanza to [Hughes'] shareholders." 1 *Legis. Hist.* 1791. If this complaint is dismissed, such unusual facts may become more commonplace.

The essence of petitioner' argument is that employers may use the assets of a pension plan, including those attributable to participant contributions, not only for benefits to participants in that plan, but also for any other pension obligation. In practice, the

loophole opened would have virtually no limit, and trust assets, including those from employee payments, could be used for almost any corporate strategy. Here, Hughes used Contributory Plan assets largely attributable to employee contributions to fund a new plan for different Hughes employees. Next time, it might transfer assets to GM's underfunded plan. Plan assets could also be used to finance corporate acquisitions. Instead of writing a check on its own funds, the acquiring company could use plan surplus to meet the acquired company's benefit obligations.[23] Employers could also use pension plan assets, including those derived from employee payments, to settle unrelated claims by employees who are *not* participants in the plan, by simply "amending" the plan to grant them benefits. § 1103 outlaws such acts, but if "amending" a plan were deemed an unreviewable act, the statute would have little force. The complaint states a valid claim.

III. THE § 1344 CLAIM IS NOT SUBJECT TO DISMISSAL.

A. Employers can be ordered to use Title IV procedures.

Petitioners argue that since Hughes has not used Title IV procedures there cannot be a termination of the Plan. Pet. Brf. 10, 34-37. When this argument first surfaced, after the Ninth Circuit panel decision, plaintiffs responded (and now repeat) that they seek

> "an order that a wasting trust be terminated in accordance with the procedures of Title IV of ERISA, including submission to the PBGC. If there is any doubt, plaintiffs so state here and now." Response Opposing Petition for En Banc Rehearing filed September 5, 1997 at 2.

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[23] As previously noted, the "sales price" in the emrger of Raytheon and Hughes undoubtedly reflected the fact that Hughes was paying its debt to the noncontributory plan with the Contributory Plan's money.

Distribution under § 1344, referred to in the complaint, is simply the last step in plan termination under Title IV.

The United States objects that the complaint "alleges that the plan in fact terminated." U.S. Brf. 15. In retrospect, the complaint would have been clearer had it said not that Hughes "terminated the Plan" and "as such" is bound by § 1344, but that Hughes' acts required it to terminate the Plan under Title IV. The complaint can be amended if it is deemed confusing. Judge Gadbois dismissed without leave to amend. Pet. App. 62a.

The issue for this Court is not whether a plan can only be terminated through Title IV means, which no one denies, but whether a court can order an unwilling employer to use those procedures. The United States -- unlike petitioners, and receding from the PBGC's earlier position -- agrees that the answer may be "yes," but says the Court need not reach the issue. U.S. Brf. 15-16 and n. 5. Contrary to petitioners, a court can order Title IV procedures used.

Petitioners admit courts "enforce an employer's *contractual* promise to terminate a plan" by ordering use of Title IV procedures. Pet. Brf. 41 n. 8, acknowledging *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), and *Phillips v. Bebber*, 914 F.2d 31 (4th Cir. 1990). In doing so, a court applies common-law contract principles. It makes little difference if the court applies the common law of trusts: either way, it applies common law to compel a now-unwilling employer to follow through on its once-voluntary commitment. There is perhaps no more firmly established ERISA precept, most recently reaffirmed in *Varity*, than that courts applying ERISA look to the law of trusts.

In re Gulf Pension Litigation, 764 F.Supp. 1149 (S.D. Tex. 1991), *aff'd in part sub nom.*, *Borst v. Chevron Corp.*, 36 F.3d 1308

(5th Cir. 1994), applied the common law of trusts, on a "wasting trust" theory substantially identical to the one here, and required that an employer terminate two pension plans using Title IV procedures. The case is discussed below. Besides *Bebber* and *Gulf*, which ordered employers to use Title IV procedures, and *Beaumont Glass*, which reversed dismissal of a complaint seeking such an order, *Matter of Esco Manufacturing Co.*, 50 F.3d 315 (5th Cir. 1995), strongly implies a court can issue such an order. *Esco* reversed a district court's order that a bankruptcy trustee terminate the debtor's pension plan, because the trustee was the successor of the plan sponsor while Title IV proceedings must be initiated by the plan administrator. The finding that "The district court erred... in holding that the trustee had the power to terminate the plan" implies that an order that an administrator do so could be proper.[24]

A court's power to order employers to use Title IV procedures is supplied by §§ 1109 and 1132 which authorize equitable relief, respectively, to redress a breach of fiduciary duty and to enforce ERISA. *Cf. Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978) (§ 1109 allows court to appoint receiver); *Corley v. Hecht Co.*, 530 F.Supp. 1155, 1164 (D.D.C. 1982) (requiring employer to nominate successor fiduciary). Fiduciary duties extend to responsibilities created by ERISA. *Central States*, 472 U.S. at 572. It is the administrator, a fiduciary, and not the plan sponsor which is empowered by § 1341 to file the notices required for plan termination. *See Esco, supra*. If a sponsor blocks the use of trust assets for the trust's beneficiaries, the administrator may have an obligation to terminate the plan. § 1103, similarly, may

[24] Withdrawn opinions in *Esco*, 33 F.3d 509 (5th Cir. 1994), make the underlying situation clearer. The original majority and dissent agreed, *Id.* at 515 and 518, that "Someone must shoulder the responsibility for terminating the pension plan," but the dissent called it unnecessary to make the trustee act and create a conflict with bankruptcy law since "ERISA provides an alternative," a PBGC-initiated distress termination under 29 U.S.C. § 1342. For the overfunded Contributory Plan this alternative does not exist.

require plan termination if plan assets are inuring to the employer's benefit.

The obvious point of much of Title IV, including § 1344, is to protect employees. If an employer could evade these protections by refraining from formal notice of a plan termination, the protections would have little meaning. Once again, a hypothetical example may make this clearer. Suppose that instead of barring new participants and using Contributory Plan assets to pay for a different plan, Hughes had closed participation in the already overfunded Contributory Plan, then simply waited for all its beneficiaries to die. At some point it would be obvious, even without expert testimony, that the Contributory Plan's still-growing surplus would never be used for its participants. At least for a contributory plan for which Congress has established a remainder interest in the participants, this result is impermissible. Hughes would be breaching §§ 1103 and 1104, and jurisdiction to order use of Title IV procedures would exist under §§ 1109 and 1132. The same is true here.

Petitioners stress that a regulation cited by the Ninth Circuit which says that "whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances" predates ERISA. Pet. Brf. 38, citing 26 C.F.R.§ 1.401-6(b)(1). While plans now terminate through Title IV, whether use of those means is required may be illuminated by what constituted a termination under the Code. *Cf. Gluck v. Unisys Corp.*, 960 F.2d 1168, 1184 (3d Cir. 1992) (tax rules relevant, though not controlling, in ERISA determination). § 1341 now sets the "exclusive means' for plan termination, but does not address how or when termination (through those means) can be required. In the same way, ERISA's provisions concerning plan amendment, following "standard trust law principles," do not address courts' power to test the adoption of amendments against what is required by corporate law. *Curtiss-Wright*, 514 U.S. at 84-5.

This is one of many instances under ERISA in which substance, not just procedure, matters. Under 26 C.F.R. § 1.404(a)(26), whether a plan provides "meaningful benefits" is also decided "on the basis of all the facts and circumstances." More directly relevant to Title IV, the existence of a "follow-on" plan precluding termination under PBGC rules upheld in *PBGC v. LTV Corp.*, 496 U.S. 633 (1990), depends on the "substantial identity" of benefits before and after the termination. In that case this Court, adopting the PBGC's view, found the permissibility of plan termination ultimately a question of economic substance, which the employer could not simply foreclose by choosing whether to file a notice of intent to terminate. Here as in other instances, what ERISA requires can only be assessed in light of specific facts.

B. Whether Hughes should be ordered to terminate the Contributory Plan depends on disputed factual issues.

The complaint alleges that by closing the Contributory Plan to new participants, Hughes created an actuarial certainty that a large portion of surplus Plan assets, including those from employee contributions, would never be used for Contributory Plan participants. Common-law courts in such circumstances ordered trusts, often called "dry," "wasting" or "resulting" trusts, terminated and their assets equitably distributed.

> "A resulting trust arises when an express trust fails in whole or in part, or the purposes are fully accomplished without exhausting the trust property.... [T]he trustee can be compelled to convey the property to the beneficiary." *Restatement of Trusts* 2d, § 73 (also stating that a constructive trust may arise to prevent unjust enrichment).

Resulting trust principles have been applied to pension plans. *See, e.g., Pollack v. Castrovinci*, 476 F.Supp. 606, 616-7 (S.D.N.Y.

1979), *aff'd*, 622 F.2d 575 (2d Cir. 1980);. *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 (Sup. Ct. of Canada) (on plan termination, common law creates a resulting trust for those who contributed to a pension plan, rejecting claims that "a pension plan constitutes a trust whose sole purpose is to provide defined benefits"). The allocation of surplus on plan termination which is prescribed by § 1344 resembles a common-law resulting trust:

> "If several persons contribute to a fund... and the purpose is fully exhausted without exhausting the trust property... a resulting trust of the surplus will arise in favor of the contributors... in proportion to their contributions." *Restatement of Trusts* 2d, §§ 399(n) and 400(d) (also referring to such contributors as "settlors").

The point is not, as Judge Norris seems to have thought, that "the non-contributory benefit structure somehow had the effect of converting the Plan into a 'wasting or dry trust.'" Pet. App. 42a. The point, rather, is that closing participation in the *Contributory* Plan, which-capped its potential liability to Contributory Plan participants at a level far below surplus assets, had this effect. Facts alleged here are substantially identical to those in *In re Gulf Pension Litigation, supra*, where the court (in a holding not appealed) concluded that a plan rendered a wasting trust must be terminated, and ordered the defendant "to submit termination papers to PBGC." 764 F.Supp. at 1204-5, 1216.[25] *Cf. Chambers v. Kaleidoscope, Inc. Profit Sharing Plan and Trust*, 650 F.Supp. 359, 372 (N.D.Ga.

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[25] The *Gulf* complaint, like this one, alleged that plans "should be terminated" and surplus distributed. 764 F.Supp. at 1201. The court found the plans wasting trusts and that there was equitable power to order them spun off from a plan into which they had merged, and terminated "according to the terms of the Final Judgment." *Id.* at 1204-5. That judgment, *Id.* at 1216, ordered the employer to take "ministerial steps" including filing with the PBGC.

1986) (ordering termination of defined contribution plan to prevent benefits from "end[ing] up in legal limbo forever").

That benefits are still being paid and some Contributory Plan participants continue to accrue benefits does not address the key point: that Contributory Plan assets substantially exceed those needed for "all current and future pensions of participants." J.A. 26. In *Gulf*, the wasting trusts were also still paying benefits and had current participants with projected benefits from future service of $4 million, "*de minimis* in relation to the surplus." 764 F.Supp. at 1203. That a plan is paying benefits does not make it "well-operating," Pet. Brf. 14, if assets are accumulating for the employer's rather than participants' benefit. Factual questions such as the amount of projected future benefits or how many millions are *de minimis* cannot be decided on a motion to dismiss, as the Ninth Circuit recognized. Pet. App. 11a and n. 3, 21a n. 6.

Petitioners, and amici which support them, argue that Plan surplus "is a cushion for bad times" and that to terminate the Contributory Plan would not be good for participants. Pet. Brf. 42; U.S. Brf. 17, Hughes Aircraft Retirees' Association Brf. 4-9. This amounts to little more than disputing the facts. The briefs argue that active employees who participate in the Contributory Plan should not be stopped from accruing additional benefits, ignoring the essence of plaintiffs' allegation: that the Contributory Plan's assets are so large it can pay all future, as well as current, accruals, and still be left with hundreds of millions of dollars of surplus assets which must be distributed under § 1344.[26]

The district court can consider any facts tending to show that termination is unnecessary, as well as whether the plaintiffs, who are

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[26] HARA's assertion that the Department of Defense might seek to reclaim a part of the pension surplus is not only speculative, but at most involves the portion of surplus derived from Hughes' rather than employees' payments.

seeking class certification, speak for participants in the Contributory Plan. These issues are factual, not a basis to dismiss the complaint. Testimony might show, for example, that Contributory Plan assets suffice to pay future benefits by buying guaranteed annuities or Treasury notes, while still leaving a surplus that should be distributed, not diverted to pay Hughes' debts. Though time and chance may happen to all, *Ecclesiastes* 9:11, no tablet says that Contributory Plan surplus (now being siphoned off by Hughes) is ephemeral as a matter of law.

Petitioners and supporting amici also point to complexities posed by the termination process, such as the difficulty of setting a termination date when Hughes has delayed filing a notice of intent to terminate. Pet. Brf. 40; U.S. Brf. 15. These questions must be addressed by the PBGC in the first instance. In exceptional cases, retroactive termination dates can be proper, as the PBGC and courts have recognized. *See In re Braniff Airways, Inc.*, 24 B.R. 466, 470 (Bkrtcy. Tex. 1972); *Harris & Sons Steel Co.*, 706 F.2d at 1295 n. 15. Plan administrators in such cases "may be liable to PBGC or participants for losses caused by delay" in filing. Opinion No. 82-25, 1982 WL 21123 (P.B.G.C.).

Normal methods for allocating surplus "equitably," as required by § 1344, can be modified if necessary to protect certain participants. *Cf. Valhi*, 22 F.3d at 972 (modifying presumptively appropriate method of calculation). In any event, an order that the Contributory Plan terminate is not the only remedy requested by the complaint. J.A. 31. Other remedies which might ultimately be considered, for example an improvement in benefits so surplus can be used, should likewise be discussed in a developed factual context.

The United States argues that the Contributory Plan's purposes are not accomplished. U.S. Brf. 10, 16-17. The Ninth Circuit rightly found that a factual question. Pet. App. 11a. "The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the

circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.'" *Firestone*, 489 U.S. at 112. One purpose of § 1103, as discussed earlier, was to modify traditional trust law's emphasis on settlor instructions when this did not "adequately protect the interest of plan participants." 1 *Legis. Hist.* 275. There is nothing in the record about the Plan's purposes as stated in pre-1985 documents. *Cf. Hickerson v. Velsicol Chemical Corp.*, 778 F.2d 365, 376-80 (7th Cir. 1985) (original plan documents did not permit recent amendment). Nor is it even clear, as discussed earlier, who should be treated as settlor(s) of this contributory trust. These are all questions which this Court "need not here answer and which would benefit from further development in the lower courts." *Lockheed*, 517 U.S. at 898 (Breyer, J., concurring and dissenting).

Even taking at face value documents from defendants which state the Contributory Plan's purpose as stimulating "eligible employees" (J.A. 61), there is a factual question whether Contributory Plan assets will be used to benefit those employees or will, to an actuarial certainty, be diverted to Hughes' separate debt for benefits due new workers who are *not* eligible for the Contributory Plan, or to other corporate purposes. The Ninth Circuit was correct in finding that whether the Contributory Plan's purposes are accomplished and its liabilities fixed are factual questions. The question now before this Court -- whether a district court can, if the facts so warrant, order an employer to use Title IV termination procedures -- should be answered in the affirmative.

III. THE § 1053 CLAIM IS NOT SUBJECT TO DISMISSAL.

Petitioners argue that nothing in ERISA "creates any entitlement to investment income generated by employee contributions." Pet. Brf. 31. 29 U.S.C. § 1053 requires that employee rights in accrued benefits derived from their own contributions be nonforfeitable, and § 1054(c)(2) defines such nonforfeitable rights to include mandatory employee contributions

plus an imputed rate of interest. If those exceed promised defined benefits, they are nonetheless nonforfeitable.

Petitioners admit that § 1053 might be breached "by depleting plan assets that are needed" for nonforfeitable accrued benefits. Pet. Brf. 32. This is precisely what plaintiffs allege. The claim is not contradicted by allegations that the Contributory Plan is overfunded. Particularly in a Plan which continues to require employee contributions long after all present and future defined benefits are fully funded, "accumulated contributions" as defined in § 1054 may exceed the accrued benefits against which plan surplus is measured. By depleting Contributory Plan surplus, Hughes threatens a forfeiture of protected benefits.[27]

CONCLUSION

We end as we began -- with petitioners' "pot of gold." In Irish folklore, leprechauns hid gold at the rainbow's end. Hughes' means of gathering the assets it claims may indeed be like that of leprechauns: "In the night time we go about the country into people's houses and we clip little pieces off their money, and so, bit by bit, we get a crock of gold together." James Stephens, *The Crock of Gold*, ch. 8 (1912). Leprechauns, though, were small hard-working shoemakers saving a ransom for use if captured. Hughes just wants to pay its bills with employees' money. It resembles a leprechaun mainly in grasp and cunning.

ERISA requires that plan assets, especially those attributable to employee contributions, be held in trust and never inure to the

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[27] As discussed earlier, if petitioners were correct in saying that the Contributory Plan and noncontributory plan are two "structures" of one plan, that hybrid, for § 1054 purposes, would have to be deemed a defined benefit plan that "permits voluntary employee contributions." Participants in the "contributory structure" would be entitled to investment earnings instead of the imputed rate.

employer's benefit. If that principle is eroded, abuses which ERISA aimed to stop will resurface. Regardless what "investment risk" it can be said to run, a plan sponsor under ERISA is not an insurance company. An employer cannot dip into the pot of plan assets -- especially when the pot was filled by employees -- to meet its non-plan debts. For these reasons, the judgment reversing dismissal of the complaint must be affirmed.

Dated:
August 17, 1998

Respectfully submitted,

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APPENDIX

HUGHES NON-BARGAINING RETIREMENT PLAN

THIS AGREEMENT executed by HUGHES AIRCRAFT COMPANY, a corporation organized under the laws of the State of Delaware (hereinafter "Company"), evidences the terms of the Hughes Non-Bargaining Retirement Plan (hereinafter "Plan"). This Plan is one of two plans resulting from the split of the Hughes Retirement Plan, originally effective January 1, 1951, and subsequently amended from time to time thereafter. The other plan resulting from the split is known as the Hughes Bargaining Retirement Plan. In order to comply with the requirements of the Tax Reform Act of 1984 and the Retirement Equity Act of 1984, this further amendment to the Plan is effective, unless otherwise specifically stated, as of January 1, 1985 as to persons who were Employees or who retired on or after such date. For Employees who terminated or retired prior to January 1, 1985, benefits shall be determined by the Hughes Non-Bargaining Retirement Plan in effect prior to January 1, 1985, or if applicable, by the provisions of the Hughes Retirement Plan in effect prior thereto.

The purposes of the Plan are:

(1) To stimulate and maintain among eligible employees of the Companies, a sense of responsibility, cooperative effort and a sincere interest in the progress and success of the Companies.

(2) To increase the efficiency of such Employees and to encourage them to remain with the Companies until retirement from active service.

The Plan is a qualified pension plan which is intended to comply with the provisions of Section 401 and other applicable provisions of the Internal Revenue Code, similar provisions of the California Revenue and Taxation Code, Section 7(d)(4) of the Fair

Labor Standards Act of 1938, as amended, and the Employee Retirement Income Security Act of 1974.

ARTICLE I

DEFINITIONS

Section 1.1 - General

Whenever any of the following terms is used in the Plan with the first letter capitalized, it shall have the meaning specified below unless the context clearly indicates to the contrary.

Section 1.2 - Accounting Month

"Accounting Month" as to a Participant means the month, or four-or-five-week period, regularly used by this Company for its accounting records. With respect to years prior to 1976, an Accounting Month shall be one-twelfth of a calendar year.

Section 1.3 - Accrued Benefits

The "Accrued Benefit" of a Participant, as of his Separation from the Service, means the greatest of (a), (b), or (c):

(a) the greater of

(i) his Normal Retirement Benefit determined under Section 4.2, without regard to Section 4.3, but with reference to the greater of the alternative Benefits under Section 4.4 or 4.5, calculated on the basis of his Benefit Accrual Service as of such Separation from the Service, or

(ii) paragraph (i) of subsection (a) - calculated - as if the Separation from the Service of the Participant were on March 1, 1982, as if all Compensation for the month of February 1982 were the figures shown as paid on the Company's records ending with the last payroll period ending before March 1, 1982, and as if all the Participant's vacation not taken as shown at close of a Company's records for the February 1982 accounting month were paid to the Participant within such payroll period.

(b) the greater of

(i) his Normal Retirement Benefit determined under Section 4.3 as if

a there were added to his Total Benefit Accrual Service the period from the date of such Separation from the Service to his Normal Retirement Date and

b his Primary Insurance Amount were determined under Section 1.45, or

(ii) paragraph (i) of subsection (b) calculated as if the Separation from the Service of the Participant were on March 1, 1982 as if the Compensation for the month of February, 1982 were the figures shown as paid on the Company's records ending with the last payroll period ending before March 1, 1982, and as if all the Participant's vacation not taken as shown at close of a Company's records for the February 1982

accounting month were paid to the Participant within such payroll period.

(c) the Actuarial Equivalent of his total Participant Contributions without interest, exclusive of Participant Contributions made prior to a break in Continuous Service commencing before 1976.

Section 1.4 - Accrued Benefit Derived from Company Contributions

The "Accrued Benefit Derived from Company Contributions" of a Participant as of his Separation from the Service means that Benefit equal to the excess (if any) of the Participant's Accrued Benefit over his Accrued Benefit Derived from Participant Contributions.

Section 1.5 - Accrued Benefit Derived from Participant Contributions

The "Accrued Benefit Derived from Participant Contributions" of a Participant as of his Separation from the Service means the lessor of

(a) his Accrued Benefit, and

(b) his annual benefit in the form of a single life annuity (without ancillary benefits) commencing at Normal Retirement Age, equal to the Participant Contributions Account multiplied by the appropriate conversion factor of 10% multiplied by an actuarial adjustment factor of 68%, or such other percentage as may be required by law.

Section 1.6 - Actuarial Equivalent: Actuarially Equivalent

"Actuarial Equivalent" or Actuarially Equivalent" means the equivalent of a given Benefit or a given amount payable in another manner or by other means, determined conclusively by or under direction of the Administrator based upon the interest rate and the table of adjusted mortality rates determined as follows:

(a) the interest rate shall be:

(i) for the plan year commencing January 1, 1982, 7%;

(ii) for that in the year in which benefits commence shall be used to determine the mortality rate.

(iii) for the plan year commencing January 1, 1984, 75% of the immediate annuity rate in effect for January 1, 1984 in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(iv) for the plan year commencing January 1, 1985, 80% of the immediate annuity rate in effect for January 1, 1985, 80% of the immediate annuity rate in effect for January 1, 1985 in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(v) for the plan year commencing January 1, 1986, 80% of the immediate annuity rate in effect for October 1, 1985, in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(vi) for the plan year commencing January 1, 1987, 90% of the immediate annuity rate in effect for October 1, 1986 in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(vii) for the plan year commencing January 1, 1988, 95% of the immediate annuity rate in effect for October 1, 1987 in Appendix B of

Pension Benefit Guaranty Corporation Regulation Section 2619;

(viii) for the plan year commencing January 1, 1989, and for each plan year thereafter, 100% of the immediate annuity rate in effect for the October 1st preceding each such year, in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(b) the table of adjusted mortality rates is a table of ages and corresponding annual mortality rates. The mortality rates are calculated by combining 80% of the rate for males and 20% of the rate for females from the 1971 Group Annuity Mortality Table. The attained age of the Participant in the year in which benefits commence shall be used to determine the mortality rate.

<u>Section 1.7</u> - <u>Administrator</u>

"Administrator" means "HUGHES AIRCRAFT COMPANY, acting through its officers or their delegates, and not through its Board of Directors, except that during such time as a Committee is in existence, such Committee shall be the Administrator. The Administrator shall function as provided in the Plan, the Trust Agreement and ERISA.

<u>Section 1.8</u> - <u>Anniversary Date</u>

"Anniversary Date" of a Participant means an anniversary of the later of

(a) his first day on the job after his first employment by a Company while a Company, and

(b) his first day on the job after his first rehire by a Company following his most recent break in Continuous Service commencing before 1976.

Section 1.9 - Annuity Starting Date

"Annuity Starting Date" of a Participant means the Early, Normal, or Late Retirement Date of a Participant, as determined by the provisions of the Plan relating thereto, or such date as may be elected by a Participant, provided:

(a) Such election is made prior to a Separation from the Service by giving written notice to the Administrator; and

(b) Such date is not more than ten years later than the Participant's Normal or

(c) The present value of Benefit payments to be made to a Participant as the Annuity Starting Date is more than 50% of the present value of the total of Benefit payments to be made to the Participant and any Beneficiary, except where such Beneficiary is the spouse of the Participant; and

(d) For distributions made on or after January 1, 1985, the entire interest of the Participant will be distributed in accordance with either of the following:

(i) not later than April 1 of the calendar year following the later of:

a the calendar year in which the Participant attains Age 70-1/2, or

b the calendar year in which the Participant retires. Subparagraph b shall not apply in the case of a Participant who is a five percent owner as defined in Section 416 of the Code during the Plan Year ending in the calendar year in which the Participant attains age 70-1/2; or

(ii) commencing no later than the taxable year described in paragraph (I) and payable over the life of the Participant or over the lives of the Participant and any Beneficiary, or over a period not exceeding the life expectancy of the Participant or over the joint life expectancies of the Participant and any beneficiary.

Any Participant who has properly elected an Annuity Starting Date may revoke such election and make a new election at any time while employed by the Company by giving written notice to the Administrator.

Section 1.10 - Beneficiary

"Beneficiary" means a person or trust designated in writing from time to time by a Participant or Former Participant to receive Benefits in the event of his death, as provided in Sections 4.2, 4.8, 4.10, 4.11, 4.12, 4.14, 4.17, 6.1 or 6.9, or if no effective designation is made, then his spouse and if there is no spouse, then his heirs determined under the laws of the state of his residence.

Section 1.11 - Benefits

The "Benefit" of a Participant means payments payable in the amounts, to the persons, at the times, and over the applicable

period (including any final lump-sum payment) specified in Article IV.

Section 1.12 - Benefit Accrual Service

"Benefit Accrual Service" of a Participant means the total, expressed in years and fractional years, of

(a) those Accounting Months (treating each Accounting Month as one-twelfth year and excluding Accounting Months commencing before a break in his Continuous Service commencing before 1976) for any part or all of which he made contributions to the Plan as a Participant, Union Officer, or participant in the Income Insurance Plan; and, as applicable, either

(b) for a person employed by a Company on January 1, 1980, benefit accrual service credited to such Employee under the Hughes Retirement Plan prior to January 1, 19809, provided such Employee satisfied the requirements of Section 2.1(b)(iii) of the Plan on such January 1st, or

(c) for a former Employee not employed by a Company on January 1, 1980, benefit accrual service credited to such former Employee under the Hughes Retirement Plan prior to January 1, 1980, provided such former Employee's last job classification satisfied the requirements of Section 2.1(b)(iii) of the Plan.

Section 1.13 - Board

"Board" means the Board of Directors of HUGHES AIRCRAFT COMPANY actions as such or by and through its Executive Committee.

Section 1.14 - Break in Service Year

A "Break in Service Year" of an Employee or former Employee means a period of fifty-three weeks (using his regular payroll week) ending with the week in which his Anniversary Date falls, if

(a) at the end of such period he is not an Employee,

(b) such period ends before his Normal or Early Retirement Date, and

(c) during such period he did not have more than five hundred Hours of Service.

For purposes of determining whether a Break in Service Year has occurred for participation and vesting purposes, an Employee who is absent from work that commences for maternity or paternity reasons shall receive credit for the Hours of Service which would otherwise have been credited to such Employee, but for such absence, or in any case in which such hours cannot be determined, eight hours of service per day of such absence. For purposes hereof, an absence from work for maternity or paternity reasons means an absence by reason of the pregnancy of the Employee, by reason of a birth of a child of the Employee, by reason of the placement of a child with the Employee in connection with the adoption of such child by such Employee, or for purposes of caring for such child for a period beginning immediately following such birth or placement. The Hours of Service credited hereunder shall be credited in the computation period in which the absence begins

if the crediting is necessary to prevent a Break in Service Year in that period, or in all other cases, in the following computation period.

Section 1.15 - Committee

"Committee" means the Administrative Committee, if any, appointed in accordance with Section 5.3.

Section 1.16 - Company; Companies

As the context requires, "Company" or "Companies" means HUGHES AIRCRAFT COMPANY, any other corporation listed on the signature pages of the Plan, any corporation which subsequently adopts the Plan as a whole or as to one or more divisions in accordance with Section 6.6, and any successor corporation which continues the Plan under Section 6.7. The Companies shall act with respect to the Plan through the officers of HUGHES AIRCRAFT COMPANY or their delegates and not through their boards of directors.

Section 1.17 - Company Service

A month of Company Service of an Employee or former Employee means a calendar month of service for a Company which, if performed for HUGHES AIRCRAFT COMPANY, would at the time of performance be treated as a month of company service under Company Practice 3-0-9 as it may be amended from time to time.

Section 1.18 - Compensation

"Compensation" of a Participant for any Plan Year

(a) means his base pay, shift differential pay, Company sick leave pay, payments of state unemployment compensation for disability while receiving Company sick leave pay, payments of workers' compensation for disability while receiving Company sick leave pay, payment for over-time hours, vacation actually taken, holiday, bereavement, personal leave, jury duty or military training pay, sea duty premium, hazard area premium, domestic field allowances, flight pay, compensable travel pay, capture and detention pay, foreign service premiums, working leader bonuses, sales commissions or bonuses, cost of living allowances, amounts paid under the Salary Adjustment Plan and Supplementary Compensation Plan of the Company, and amounts deferred by the Participant which are contributed by the Company under the Hughes Aircraft Company Salaried Employees' Thrift and Savings Plan, but

(b) shall exclude any compensation not paid by a Company, foreign service allowances for post, quarters, education, dual housing, home leave and tax differential, profit-sharing payments, public or private retirement payments, contributions (except Employee contributions) or benefits, retainers, insurance benefits or Company-paid premiums, payments for vacation not taken, and other special payments.

Section 1.19 - Contingent Annuitant

"Contingent Annuitant" means a person properly designated by a Participant or Former Participant to receive Benefits, solely in accordance with Section 4.11, 4.12, 4.17, 6.1 or 6.9, in the event of his death after payment of an annuity hereunder commences.

Section 1.20 - Continuous Service

(a) "Continuous Service" of an Employee means his current period as an Employee of one or more Companies or a member of the Controlled Group in any positions or classifications, but excluding periods of unpaid absence while an Employee, excludible under Company personnel policy consistently applied, and not includible under the terms of any collective bargaining agreement. No such period of unpaid absence, however, shall be considered to be a break in Continuous Service.

(b) Continuous Service shall be broken by a Separation from the Service under which the Employee has no recall rights.

<u>Section 1.21</u> - <u>Controlled Group</u>

"Controlled Group" means the controlled group of corporations, trades and businesses as determined under regulations issued by the Secretary of the Treasury or his delegate under Sections 414(b) and 414(c) of the Internal Revenue Code (and, for purposes of Section 415 of such Code, under subsection 415(h)) of which the Companies (and by any other company so designated by the Administrator) are members.

<u>Section 1.22</u> - <u>Early Retirement</u>

"Early Retirement" of a Participant or Former Participant means his retirement upon his Early Retirement Date.

<u>Section 1.23</u> - <u>Early Retirement Benefit</u>

"Early Retirement Benefit" of a Participant or Former Participant means the Benefit payable to or with respect to him under Section 4.8.

<u>Section 1.24</u> - <u>Early Retirement Date</u>

"Early Retirement Date" of a Participant or Former Participant means the first day of a month before his Normal Retirement Date so designated under Rules of the Plan by a Participant or Former Participant who at the time of his Separation from the Service has attained his fifty-fifth birthday. Such a Participant who has a Separation from the Service by resignation or discharge may under the Rules of the Plan treat such resignation or discharge as a retirement and may treat the first day of any month following the date of such resignation or discharge as his Early Retirement Date. A Participant or Former Participant who has a Separation from the Service before his fifty-fifth birthday may elect Early Retirement in accordance with Section 4.7, effective on or after his fifty-fifth birthday.

<u>Section 1.25</u> - <u>Employee</u>

"Employee" means any person who renders services to any Company in the status of any employee as the term is defined in Section 3121(d) of the Internal Revenue Code of 1954 (or its subsequent counterpart).

<u>Section 1.26</u> - <u>ERISA</u>

"ERISA" means the Employee Retirement Income Security Act of 1974 as it may be amended from time to time.

<u>Section 1.27</u> - <u>Final Average Monthly Compensation</u>

"Final Average Monthly Compensation" of a Participant means one-twelfth of:

(a) with respect to a Separation from the Service occurring after December 31, 1975 and before July 1, 1978, the amount determined by dividing

(i) his aggregate Compensation attributed to the lesser or

a his last ten qualifying twelve-Accounting Month periods and

b all of his qualifying twelve-Accounting-Month periods,

by

(ii) the number of periods taken into account under paragraph (I), and

(b) with respect to a Separation from the Service occurring after June 30, 1978 and before December 3, 1979, the amount determined by dividing

(i) his aggregate Compensation attributed to the lesser of

a the eight highest of his last ten qualifying twelve-Accounting-Month periods and

b all of his qualifying twelve-Accounting-Month periods,

by

(ii) the number of periods taken into account under paragraph (I), and

(c) with respect to a Separation from the Service occurring on or after December 3, 1979, the amount determined by dividing

(i) his aggregate Compensation attributed to the lesser of

a the five highest of his last ten qualifying twelve-Accounting-Month periods, and

b all of his qualifying twelve-Accounting-Month periods,

by

(ii) the number of periods taken into account under paragraph (I).

(d) For purposes of this Section, a Participant's qualifying twelve-Accounting-Month period is a period beginning after 1965 of twelve consecutive Accounting Months

(i) ending with the end of the last Accounting Month preceding or coinciding with the earlier of

a the date of such Separation from the Service, or

b his Normal Retirement Date

or with the end of that Accounting Month in an earlier year most nearly corresponding with such last Accounting Month, and

(ii) in which twelve-Accounting Month in an earlier year most nearly corresponding with such last Accounting Month, and

(e) For purposes of this Section, the Compensation attributed to a Participant with respect to any qualifying twelve-Accounting-Month period shall be the Compensation earned during such period multiplied by a fraction (not less than unity) the numerator of which shall be the lesser of

(i) two thousand eighty, and

(ii) the number of Hours of Service he would have had during such period had he worked during the entire period at his regularly scheduled number of hours per week,

and the denominator of which shall be equal to the excess of his Hours of Service in such period over his Hours of Service resulting from the payment of vacation not taken in such period.

Section 1.28 - Former Participant

"Former Participant" means a person who has had a Separation from the Service and becomes entitled to Benefits under the Plan.

Section 1.29 - Hours of Service

(a) The "Hours of Service" of an Employee or former Employee means the sum of:

(i) his hours of actual work on the job,

(ii) his periods of vacation, holiday, Military Service, paid sick leave or paid leave of absence, computed on the basis of the number of

hours in his regularly scheduled work day and work week, and

(iii) his period of receipt of

a layoff supplementary pay, converted to Hours of Service on the basis of forty Hours of Service for each week in which he receives any such pay, and

b employer-funded disability pay, converted to Hours of Service on the basis of forty Hours of Service for each week in which he receives any such pay, and for a salaried Employee by dividing his most recent salary by the average number of regularly-scheduled hours of work in his salary period, ignoring holidays, sick leaves and vacations, and

(iv) his hours for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by the Company. In no event shall the same Hours of Service be credited twice under this paragraph and paragraphs (I), (ii, or (iii), and

(v) his Hours of Service with any other employer during which such employer is part of an affiliated service group (under Section 414(m) of the Code) or is a part of a Controlled Group of which the Company is a member.

Section 1.30 - Income Insurance Plan

"Income Insurance Plan" means any Income Insurance Plan of HUGHES AIRCRAFT COMPANY as presently constituted or as it may be amended from time to time, or the corresponding plan of any Company so designated by the Administrator.

Section 1.31 - Insurance Company

"Insurance Company" means any insurance company selected by the Administrator to provide contracts of insurance or annuity contracts for the purpose of funding benefits under the Plan.

Section 1.32 - Late Retirement

"Late Retirement" of a Participant or Former Participant means his retirement upon his Late Retirement Date.

Section 1.33 - Late Retirement Benefit

"Late Retirement Benefit" of a Participant or Former Participant means the Benefit payable under Section 4.10.

Section 1.34 - Late Retirement Date

"Late Retirement Date" of a Participant means the first day of the calendar month coinciding with or next following his Separation from the Service occurring later than his Normal Retirement Date, but in no event later than the date under Section 1.9(d).

Section 1.35 - Military Service

Any Employee who leaves the Controlled Group directly to perform service in the Armed Forces of the United States or the United States Public Health Service under conditions entitling him to reemployment rights as provided in the laws of the United

States, or to perform service in ACTION, shall, solely for purposes of the Plan and irrespective of whether he is compensated by any member of the Controlled Group during such period of service, be an Employee on Military Service, unless such Employee voluntarily resigns from the Controlled Group during such period of service, or he fails to make application for reemployment within the period specified by such laws for the preservation of this reemployment rights, or (in the case of ACTION) within thirty calendar days after his separation therefrom.

Section 1.36 - Normal Retirement

"Normal Retirement" of a Participant or Former Participant means his retirement upon his Normal Retirement Date.

Section 1.37 - Normal Retirement Benefit

"Normal Retirement Benefit" means the Benefit payable under Section 4.2.

Section 1.38 - Normal Retirement Date

"Normal Retirement Date" of a Participant or Former Participant means the first day of the calendar month coincident with or next following his sixty-fifth birthday.

Section 1.39 - Participant

"Participant" means any person included in the Plan as provided in Article II.

Section 1.40 - Participant Contributions

"Participant Contributions" of a Participant means his contributions to the Plan under Section 3.4 of its predecessor.

Section 1.41 - Participant Contribution Account

"Participant Contributions Account" of a Participant means his individual account established in accordance with Section 3.7.

Section 1.42 - Plan

"Plan" means Hughes Non-Bargaining Retirement Plan.

Section 1.43 - Plan Enrolled Actuary

The term "Plan Enrolled Actuary" means that person who is enrolled by the Joint Board for the Enrollment of Actuaries established under Subtitle C of Title III of ERISA and who has been engaged by the Administrator on behalf of all Participants to make and render all necessary actuarial determinations, statements, opinions, assumptions, reports, and valuations under the Plan as required by law or requested by the Administrator.

Section 1.44 - Plan Year

"Plan Year" means the calendar year, including such years preceding the adoption of the Plan.

Section 1.45 - Primary Insurance Amount

The "Primary Insurance Amount" of a Participant means the monthly primary insurance amount of his old age insurance benefit determined as of his Normal Retirement Date under the federal Social Security Act as in effect on the date of his Separation from the Service, whether more or less than the amount which would be payable if such Act remained unamended until that Date and whether or not the Participant actually applies for and receives such amount for any month, by assuming that he will receive Compensation at rates applicable on the date of such Separation from the Service, over a further period of employment

extending to his Normal Retirement Date. The Primary Insurance Amount of a Participant who again becomes a Participant following his Separation from the Service shall in no event exceed the amount which would produce that Normal Retirement Benefit to which such Participant would have been entitled had he not again become an Employee following such Separation from the Service. For any Participant for whom the Primary Insurance Amount cannot be ascertained as herein provided, said amount shall be that amount which the Administrator shall reasonably estimate. The Primary Insurance Amount determined herein for any Participant will be adjusted to reflect the actual salary history for years previously estimated before his Separation from the Service if the Participant supplies documentation of that history. Such documentation must be provided no later than a reasonable period of time following the later of the date of his Separation from the Service and the time the Participant is notified of the Benefit to which he or she is entitled. No Benefit hereunder shall be decreased by reason of any increase in the benefit levels payable under Title II of the Social Security Act or any increase in the wage base under such Title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the dat of first receipt of such Benefits or the date of Separation from the Service of the Participant to whom or with respect to whom such Benefits are paid, as the case may be.

Section 1.46 - Rules of the Plan

"Rules of the Plan" means rules and regulations of interpretation, administration, and application of the Plan, as properly established and consistently applied by the Administrator.

Section 1.47 - Separation from the Service

(a) The term "Separation from the Service" of an Employee means his quit, discharge, layoff (other than

a temporary layoff), Early, Normal or Late Retirement from the Companies, or his death.

(b) A leave of absence, (whether paid or unpaid) authorized by a Company in accordance with established policies, a vacation period, a temporary layoff, acceptance of a position as a Union Officer, Military Service or a transfer among members of the Controlled Group shall not constitute a Separation from the Service; provided, however, that

(i) Continuation upon a temporary layoff for a period in excess of the maximum period for temporary layoffs specified in the then applicable Company practice, shall be considered a layoff effective as of the end of such specified period.

(ii) Failure to return to work upon expiration of any leave of absence, vacation, or temporary layoff shall be considered a quit effective as of the expiration of such leave of absence, vacation, or temporary layoff.

Section 1.48 - Total Benefit Accrual Service

"Total Benefit Accrual Service" means, with respect to an Employee, the sum of

(a) his Benefit Accrual Service pursuant to the Hughes Non-Bargaining Retirement Plan

and

(b) his Benefit Accrual Service pursuant to the Hughes Bargaining Retirement Plan.

Section 1.49 - Trust

"Trust" means the trust established pursuant to the Trust Agreement.

Section 1.50 - Trust Agreement

"Trust Agreement" means that certain Trust Agreement pursuant to Hughes Non-Bargaining Retirement Plan and Hughes Bargaining Retirement Plan, as it may be amended from time to time, providing for the investment and administration of the Trust Fund. By this reference, the Trust Agreement is incorporated herein.

Section 1.51 - Trustee

"Trustee" means the Trustee and any successor or substitute trustee under the Trust Agreement.

Section 1.52 - Trust Fund

"Trust Fund" means the fund established under the Trust Agreement by contributions made by the Companies and Participants pursuant to the Plan and from which any distributions under the Plan are to be made.

Section 1.53 - Union Officer

A "Union Officer" means a Participant who accepts a leave of absence or part-time employment from the Companies to assume a paid position as an officer or business agent of a union which is the collective bargaining representative for a collective bargaining unit consisting of or including Employees, so long as he holds such a position, if he is entitled pursuant to a collective bargaining agreement with a Company to be a Participant while on

such leave of absence or in such part-time employment and has not waived such right.

Section 1.54 - Vested

"Vested" means nonforfeitable except to the extent provided in Sections 4.14 and 4.18.

Section 1.55 - Vested Retirement Benefit

"Vested Retirement Benefit" shall have the meaning given in Section 4.15.

Section 1.56 - Year of Service

"Year of Service" of an Employee means a period of fifty-three weeks (using his regular payroll week) ending with eh week in which his Anniversary Date falls, during which period he completed one thousand or more Hours of Service.

Section 1.57 - Years of Vesting Schedule Service

"Years of Vesting Schedule Service" of a Participant means the greater of

(a) the number of his Years of Service completed after he first became an Employee and while his Company (if other than HUGHES AIRCRAFT COMPANY) was fifty percent or more owned, directly or indirectly, by, or under common control with, HUGHES AIRCRAFT COMPANY, but excluding each ear of Service ending

(i) before 1976 and before or during a break in his Continuous Service commencing before 1976,

(ii) after 1975, before a Break in Service Year, and not followed by any Year of Service after such Break in Service Year, or

(iii) before he has five Years of Vesting Schedule Service (determined without regard to this paragraph (iii) and before the number of consecutive Break in Service Years equals or exceeds five (ignoring for this purpose any Years of Service excluded by virtue of any previous application of this paragraph (iii)); or

(b) one-twelfth (1/12th) of his months of Company Service (rounding down to the next lowest whole number.

ARTICLE II
ELIGIBILITY

Section 2.1 - Requirements for Participation

(a) Effective January 1, 1980 any person who was a Participant in the Hughes Retirement Plan on December 31, 1979 and not employed in a bargaining unit covered by a collective bargaining agreement shall remain a Participant until Section 2.4 or 2.5 applies to him.

(b) Any other Employee who

(i) had not attained the age of sixty-four years and six months on last becoming an Employee, and

(ii) has completed either

a a twelve-month period commencing with

1 his first Hour of Service since the date he was hired as an Employee of his Company (whether or not then a Company), or

2 his Anniversary Date

in which period he had completed one thousand (1,000) or more Hours of Service, or

b twelve months of Company Service, and

(iii) is not an Employee in a bargaining unit covered by a collective bargaining agreement with respect to which retirement benefits were the subject of good faith bargaining (unless such agreement provides for coverage hereunder of Employees in such unit), and

(iv) is not a Sales Representative of Theta Cable of California, and

(v) is on the United States payroll of his Company (as maintained by such Company in accordance with its established practice), and

(vi) complies with the requirements of Section 2.3,

shall become a Participant after 1979, effective as of the first Monday of the calendar month coincident with or next following his satisfaction of such requirements.

(c) Any participant whose participation is terminated by a Separation from the Service under Section 2.4 shall again become a Participant upon again becoming an Employee and complying with the requirements of paragraphs (iii)-vi), inclusive, of subsection (b). There shall be no duplication of any previously Accrued Benefits by reason of a Participant's readmission to the Plan.

Section 2.2 - Notice of Eligibility

The Administrator shall give reasonable advance written notice to the Employees of their prospective eligibility to become Participants.

Section 2.3 - Application to Participants

The Administrator shall furnish each eligible Employee with a form of application for participation in which, as a condition precedent to participation, he shall state:

(a) his request for participation in the Plan;

(b) his name, date of birth, name and date of birth of spouse, and other relevant information;

(c) his consent that he, his Beneficiaries, Contingent Annuitants, successors in interest, and all persons claiming under him, shall be bound by the statements contained therein and the provisions of the Plan as they now exist, and as they may be amended from time to time, to the extent consistent with applicable law, and

(d) his agreement to make Participant Contributions under Section 3.4 in accordance with Section 3.5 and his authorization to his Company to withhold such

amounts from his Compensation and transmit the same to the Trustee in accordance with Sections 3.5 and 3.6.

Section 2.4 - Termination of Participation

A Participant shall cease to be a Participant and shall become entitled to Benefits, if any, in accordance with Article IV, upon his Separation from the Service.

Section 2.5 - Suspension During Continuous Service

A Participant may suspend his participation in the Plan during his Continued Service at any time by giving such advance written notice to the Administrator as is required under the Rules of the Plan that he declines to make contributions under Section 3.4 for a period of twelve calendar months and thereafter until he again complies with Section 2.3, which notice shall be effective and irrevocable in accordance with its terms upon receipt by the Administrator.

Section 2.6 - Forfeitures

If a Participant has a Separation from the Service for any reason prior to his acquisition of a fully Vested Retirement Benefit, the unvested portion of his Accrued Benefit Derived from Company Contributions shall be forfeited at the earliest of

(a) if he then has less than five Years of Vesting Schedule Service, that date when the number of his consecutive Break in Service Years equals five,

(b) if he has then had one or more Break in Service Years not followed by a Year of Service, immediately preceding his sixty-fifth birthday, or

(c) if he then has less than five Years of Vesting Schedule Service, his withdrawal of Participant Contributions under Section 3.8(a) provided that any such unvested portion shall be restored subject to subsequent forfeiture under this Section, if, before subsection (a) applies, he restores such withdrawn Contributions with interest under Section 3.8(b).

Section 2.7 - Inactive Status

(a) A Participant who is transferred directly to a position or classification with the Company which:

(i) fails to meet the requirements of Section 2.1(b)(iv) or (v) shall thereupon become a Participant on inactive status and shall not thereafter make contributions under Article III; or

(ii) fails to meet the requirements of Section 2.1(b)(iii) shall on the first day of the Accounting Month coinciding with or following such transfer become a Participant on inactive status and shall not thereafter make contributions under Article III.

(b) All provisions of the Plan, including Article IV, will continue to apply to a Participant on inactive status.

(c) If a Participant on inactive status is retransferred to a position or classification which:

(i) meets the requirements of Section 2.1(b)(iv) and (v), he shall thereupon be restored to active status and may resume making contributions under Article III, or

(ii) meets the requirements of Section 2.1(b)(iii) he shall on the first day of the Accounting Month

coinciding with or following such transfer be restored to active status and may resume making contributions under Article III.